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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

PATRICIA A. CAMPBELL and THOMAS CAMPBELL,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a substantive due process attack on a state rule of decision that is incorporated into a Federal statute, such as the Federal Tort Claims Act, and then used by a Federal court to determine Federal rights and liabilities under that statute, is adjudicated under the Fifth Amendment, or is adjudicated under the Fourteenth Amendment which additionally requires "state action"?

2. Whether a law, refusing to allow a damages claim for the wrongful preclusion of Petitioners' right to elect a pre-viability abortion of a genetically deficient fetus, constitutes an undue burden on the parents' liberty interest in this most personal of family decisions?

(The United States Court of Appeals for the Eleventh Circuit, in its majority opinion, answered Question One by utilizing the Fourteenth Amendment and affirmed a judgment for United States on a "state action" basis, while the concurring opinion below reached the merits of the Constitutional question in Question Two but found no "undue burden".)

LIST OF ALL PARTIES IN COURT BELOW

Patricia A. Campbell
Thomas Campbell
Jennifer L. Campbell
United States of America

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, Patricia A. Campbell ("Mrs. Campbell") and Thomas Campbell ("Mr. Campbell"), respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit rendered in this case on June 15, 1992, reconsideration of which was denied by that court on August 19, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dated June 15, 1992, is reported at 962 F.2d 1579 (11th Cir. 1992), and is reproduced in Appendix A to this Petition beginning at Page 1a. The opinion of the United States Court of Appeals for the Eleventh Circuit dated August 19, 1992, denying the petition for rehearing/suggestion of rehearing en banc is unreported and is reproduced in Appendix B to this Petition beginning at Page 19a. The opinion of the United States District Court for the Northern District of Georgia dated June 28, 1991, granting the renewed motion to dismiss of the United States and dismissing the claims of Petitioners is unreported and is reproduced in Appendix C, to this Petition, beginning at Page 21a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 15, 1992.[1] A timely[2] petition for rehearing/suggestion of rehearing en banc, filed within the 21 days allowed under 11TH CIR. R. 40-2, on July 6, 1992, was denied on August 20, 1992.[3] The jurisdiction of this Court is timely invoked within 90 days after the denial of rehearing, pursuant to 28 U.S.C. § 1254(1) (1988) and SUP. CT. R. 13.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved in this case, the Fifth and Fourteenth Amendments to the United States Constitution, the Gonzales Amendment, 10 U.S.C. § 1089(a) (1988), the Federal Tort Claims Act, 28 U.S.C. §§ 2672, 2674 (1988), and the pertinent Georgia statutes, *O.C.G.A.* §§ 9-3-70, 16-12-141, 31-9-6.1, 51-1-8, 51-1-27, are set forth in Appendix I beginning at Page 65a.

STATEMENT OF THE CASE

This suit arises under the Federal Tort Claims Act, 28 U.S.C. § 2672, 2674 (1988). Petitioner Patricia A. Campbell

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[1] Pet.App. 1a.

[2] 11TH CIR. R. 40-2 modifies F.R.A.P. 40(a) by allowing 21 days for the filing of a petition for rehearing.

[3] Pet.App. 19a.

is the wife of Petitioner Thomas Campbell,[4] who retired from active duty in the U.S. Air Force as an enlisted man (E-5) prior to the acts and omissions involved in this case.[5] Mrs. Campbell was treated as an out-patient at the U.S. Army Health Clinic at Fort McPherson (GA) at various times by Dr. Yashasvini Desai, a civil service physician employed by the Army, who was in the course and scope of her civilian Army employment at all times pertinent to this case.[6] Suspecting that she was pregnant, Mrs. Campbell went to the Ob-Gyn Section of the Army Health Clinic in December 1984 and complained of symptoms consistent with pregnancy, which symptoms were noted in her health record. However, no pregnancy tests were prescribed or performed by the civilian Army Ob-Gyn physician, and Mrs. Campbell's pregnancy was not diagnosed.[7]

When her symptoms continued, Mrs. Campbell called for an appointment at the Army Health Clinic and was scheduled to be seen again by the same gynecologist.

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[4] Pet.App. 2a, 50a. This case involves adult, married parents who, having been wrongfully denied their right to elect a pre-viability abortion, have jointly brought suit against the physician's employer. There are no distracting issues of minors, of spousal notification, or of which spouse can prosecute. It is a mainline case involving a typical, middle-aged couple confronting a nightmare issue. Several States, as discussed in footnote 27 *infra*, have addressed the issue, with many allowing a damages suit, but some (as here) barring this one type of malpractice action.

[5] Pet.App. 44a.

[6] Pet.App. 2a, 44a, 51a.

[7] Pet.App. 2a, 3a, 21a, 22a, 31a, 51a, 52a.

After noting in Mrs. Campbell's health record her complaints and symptoms which were again consistent with pregnancy, the civilian Army gynecologist assured her in March 1985 that she was not pregnant, that she was going through menopause and did not order any pregnancy test.[8] At this time the fetus was 20 weeks old.[9]

Attached to the Complaint filed in Mrs. Campbell's medical malpractice case was the expert witness affidavit of a board-certified Ob-Gyn specialist[10] that the civilian Army gynecologist deviated from the standard of care in not testing Mrs. Campbell for pregnancy and that due to her age of forty, Pat Campbell was a known risk for genetic defects in any fetus she might carry. Also attached to the complaint was the expert witness affidavit of a geneticist at the University of Miami (to whom the Army had sent all three Campbells for an independent medical examination after the child was born).[11] The geneticist averred that if pregnancy had been diagnosed at either the first or second examinations by the Army gynecologist, sufficient time would have remained to have conducted amniocentesis, that the 10-Q chromosome deficiency suffered by the fetus would indeed have been disclosed, and that Mrs. Campbell could have then terminated the pregnancy in a reasonably safe manner at that time.[12]

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[8] Pet.App. 2a, 3a, 31a, 32a, 52a, 53a.

[9] Pet.App. 32a.

[10] Pet.App. 29a, 32a, 33a.

[11] Pet.App. 37a.

[12] Pet.App. 40a. These two expert witness affidavits appended to the complaint establish that both failures to diagnose were prior to viability, as the fetus was only 20 weeks old at the March 1985 visit. Pet.App. 32a.

Mrs. Campbell returned yet a third time to the Army Health Clinic and was finally given a pregnancy test. Once again, the same civilian Army gynecologist failed to diagnose pregnancy, until after the lab results were brought back by the technician.[13] By this time, April 1985, it was too late for the amniocentesis test Mrs. Campbell desired, and the chromosomal defects in the fetus went undiscovered.[14]

The advanced age and risk for a genetically defective fetus were well known to the civilian Army gynecologist.[15] Had Mrs. Campbell been timely and properly diagnosed for pregnancy and given the opportunity for genetic counselling and amniocentesis, it is alleged that she would have elected to terminate the pregnancy of the genetically defective fetus.[16] Because Mrs. Campbell had to carry the fetus to term, a female baby was born with the detectable 10-Q chromosome deletion.[17] The child has severe physical and mental deficits and expenses relating thereto.[18] She has a potential, maximum intellectual mental development of only a five to eight-year old girl

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[13] Pet.App. 3a, 22a, 32a, 53a, 54a, 57a.

[14] Pet.App. 3a, 22a, 34a, 55a, 57a.

[15] Pet.App. 54a, 55a.

[16] Pet.App. 3a, 22a. Indeed, after finally diagnosing pregnancy, the Army physician attempted to find an abortion clinic for Mrs. Campbell, but none in Atlanta would do it, because the biparietal diameter was already 6.2 cm. Pet.App. 59a, 60a.

[17] Pet.App. 3a, 22a, 40a, 46a, 55a, 57a.

[18] Pet.App. 3a, 4a, 34a, 35a.

during her lifetime,[19] which, the government admits, will be for the normal life expectancy of any retarded girl born in 1985.[20] She is fed through a stoma and has had numerous surgeries on her esophagus, eyes, and legs. The damages alleged include enormous, extraordinary costs and expenses (far beyond those for raising a normal child) which will have to be paid by Patricia and Thomas Campbell.[21] Indeed, the government has also admitted in discovery that the child will have to be institutionalized at her chronological age of adulthood because she will have to be cared for by an adult her entire life. *See* Pet.App. 56a; *see also* Decision below, 962 F.2d at 1581 & n.1, Pet.App. 3a, 4a.

REASONS FOR GRANTING THE WRIT

I.

IT IS NECESSARY TO RESOLVE THE SPLIT IN THE CIRCUITS ON WHETHER TO USE THE FIFTH OR FOURTEENTH AMENDMENTS IN RESOLVING DUE PROCESS ATTACKS ON FEDERAL STATUTES THAT INCORPORATE STATE RULES OF DECISIONS IN DETERMINING FEDERAL RIGHTS AND LIABILITIES UNDER THE FEDERAL STATUTES.

The instant case involves a Federal statute, the Federal Tort Claims Act, under which Federal rights and liabilities are determined by incorporating the relevant state law for purposes of providing the Federal courts

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[19] Pet.App. 3a, 41a, 56a.

[20] Pet.App. 56a.

[21] Pet.App. 3a, 41a.

with a rule of decision. 28 U.S.C. §§ 2672, 2674 (1988). The Eleventh Circuit below resolved the due process attack on the state rule of decision under the Fourteenth, rather than the Fifth, Amendment, thereby creating a split in the Circuits as to the appropriate analysis.[22] That analysis was inconsistent with previous decisions of this Court, as well as with those of the other Circuits. SUP. CT. R. 10.1(a). In so doing, the two-senior judge majority below held that the Georgia Supreme Court's construction of state tort law, barring a damages claim for the wrongful preclusion of the right to knowingly and freely elect an abortion prior to viability, was no different than a state appellate court's affirming a utility rate increase.[23]

Like the Federal Tort Claims Act, the Old Age and Survivor's Insurance benefits provisions of the Social Security Act incorporate state law for the rule of decision in determining family and marital relationships. 42 U.S.C. §§ 416(h)(1)(A), 416(h)(2)(A) (1988). This Court and the Second Circuit have previously adjudicated equal protection and due process attacks on the underlying state law

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[22] The government's characterization of Petitioners' claim being under the Fourteenth Amendment was adopted by the majority opinion. Pet.App. 5a. Petitioners had pointed out to the Court of Appeals below that substantive due process was the same under the Fifth and Fourteenth Amendments but that "state action" had no role in a claim under the Fifth Amendment, as this suit was filed under the Federal Tort Claims Act. *See* Reply Brief, 3-5, appended as Appendix H, Pet.App. 62a-64a. The Eleventh Circuit, having had its focus directed by the government on the state action issue, declined to refocus on the Due Process issue under the Fifth Amendment. Thus, the court below proceeded to stop short by finding no state action. Pet.App. 6a-12a.

[23] 962 F.2d 1582-83; Pet.App. 7a-8a.

relating to family relationships under the Fifth, *not* the Fourteenth, Amendment. *Mathews v. Lucas*, 427 U.S. 495, 502, 511-512 (1976) [Rhode Island illegitimacy statute]; *Thomas v. Sullivan*, 922 F.2d 132, 134 (2d Cir. 1990) [analyzing effect of differences in Georgia and New York laws on common law marriage]. The reason is clear: the attack is on a Federal provision setting rights and liabilities, and the Fifth Amendment Due Process Clause provides the operative standard.

Similarly, in the criminal context, the Assimilative Crimes Act, 18 U.S.C. § 13 (1988), sets out rights and liabilities on Federal enclaves by drawing on the state rule of decision from the state in which the Federal enclave is geographically located. Thus, the Fourth Circuit has adjudicated a due process attack on the Virginia "disorderly conduct-abusive language" statute being enforced at the National Airport under both the Fifth Amendment Due Process Clause and the Sixth Amendment. *United States v. Robinson*, 495 F.2d 30, 34 (4th Cir. 1974).

Petitioners submit that the Eleventh Circuit has plainly erred by looking for "state action" under the Fourteenth Amendment. The majority opinion in the panel decision of the Eleventh Circuit below, looked at the Georgia rule of decision precluding damage claims for the wrongful failure to diagnose pregnancy and the consequent wrongful preclusion of the opportunity to elect a pre-viability abortion. *Atlanta Obstetrics & Gynecology Group, P.A. v. Abelson*, 260 Ga. 711, 398 S.E.2d 557, *reversing*, 195 Ga. App. 274, 392 S.E.2d 916 (1990).[24] In its

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[24] Pet.App. 5a, 6a-7a, 9a-12a.

Fourteenth Amendment analysis, the majority opinion of the Eleventh Circuit focused on the state action requirement and analogized the ruling of the Supreme Court of Georgia in *Abelson* precluding damage claims for the wrongful preclusion of the right to abortion, to a judicial action approving utility rate hikes.[25]

In resolving Federal Constitutional challenges to state laws, the Federal courts will, as did the Eleventh Circuit below, look to the meaning of state statutes as they are construed by the state appellate courts.[26] *E.g.*, *Gooding v. Wilson*, 405 U.S. 518, 524 (1972). Here, the *Abelson* decision by the Georgia Supreme Court necessarily construed the extent to which the state medical malpractice statutes would allow a damages claim for the negligent preclusion of the abortion decision, finding no right of action. 260 Ga. 711, 398 S.E.2d 557.

Normally, there is not a significant difference in the result when one adjudicates due process and equal

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[25] Pet.App. 7a-8a; *but see Presbyterian Church of United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449-451 (1969) (reviewing state judicial action on church property dispute under Fourteenth and First Amendments and striking down state departure-from-doctrine rule applied by Georgia courts). If judicial intrusion into religious issues is state action sufficient for the *Presbyterian* case, then judicial hostility to abortion rights in tort cases should also be sufficient state action, and the Eleventh Circuit has erred even if "state action" is the proper standard.

[26] Pet.App. 6a, 9a-11a. Although Petitioners herein served the Attorney General of Georgia with their briefs in the court of appeals below, the Eleventh Circuit did not certify to the Georgia Attorney General under 28 U.S.C. § 2403(b) the fact that the Georgia medical malpractice statute, *O.C.G.A.* § 51-1-27, as construed in *Abelson*, had its constitutionality drawn into question.

protection attacks under either the Fifth or Fourteenth Amendments. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). However, the "state action" requirement under the Fourteenth Amendment has no relevance to a Federal court's adjudication of Federal rights and liabilities under Federal statutes that simply incorporate state law. It was, after all, the Congress that incorporated the state rule of decision.

The opinion of the Eleventh Circuit below is at odds with prior precedent in other Circuits as well as that of this Court. It is anomalous to talk about "state action" in the context of Federal statutes that set the Federal rights and liabilities of the litigants before the Federal court. This split in the Circuits should not be allowed to continue, because it will unnecessarily create bad law and sow further confusion.

The writ should be granted, and the majority opinion below should be reversed.

II.

PRECLUDING A DAMAGES ACTION FOR A WRONGFUL DENIAL OF AN ABORTION PRIOR TO VIABILITY, WHILE ALLOWING DAMAGES ACTIONS TO PROCEED AGAINST THE SAME PHYSICIAN FOR OTHER ACTS AND OMISSIONS REGARDING THE SAME PATIENT, IS AN UNDUE BURDEN ON THE PARENTS' PRE-VIABILITY LIBERTY INTEREST OF FREEDOM OF CHOICE.

Georgia, like a small number of other states,[27] bars medical malpractice claims by a woman against her

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[27] Georgia is one of two states that by caselaw disallow any recovery for medical malpractice where the gynecologist's negligence precludes an abortion, with a genetically deficient child

gynecologist in cases where the doctor has wrongfully prevented her from exercising the option to terminate her

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born thereafter. *Abelson, supra* (Ga.); *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528, *cert. denied*, 479 U.S. 835 (1986). A third state, Missouri, disallows recovery of the extraordinary costs of raising the "defective" child but allows the parents to recover general damages for emotional distress, pain and suffering. *Compare Wilson v. Kuenzi*, 751 S.W.2d 741 (Mo.), *cert. denied*, 488 U.S. 893 (1988), *with Shelton v. St. Anthony's Medical Ctr.*, 781 S.W.2d 48 (Mo. 1989).

The courts in twenty-one jurisdictions, on the other hand, have allowed recovery of the extraordinary costs of rearing the "defective" child and other damages. *Turpin v. Sortini*, 31 Cal.3d 220, 182 Cal.Rptr. 337, 643 P.2d 954 (1982); *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988); *Garrison v. Medical Ctr. of Delaware*, 581 A.2d 288 (Del. 1989); *Haymon v. Wilkerson*, 535 A.2d 880 (D.C. App. 1987); *Fassoulas v. Ramey*, 450 So.2d 822 (Fla. 1984); *Blake v. Cruz*, 108 Idaho 253, 698 P.2d 315 (1984); *Siemieniec v. Lutheran General Hosp.*, 134 Ill.App.3d 823, 480 N.E.2d 1227, *aff'd in part & rev'd in part*, 117 Ill.2d 230, 512 N.E.2d 691 (1987); *Arche v. United States*, 247 Kan. 276, 798 P.2d 477 (1990); *Proffitt v. Bartolo*, 162 Mich.App. 35, 412 N.W. 2d 232 (1987); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *Smith v. Cote*, 513 A.2d 341 (N.H. 1986); *Procanik by Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981); *Alquijay v. St. Luke's-Roosevelt Hosp. Ctr.*, 63 N.Y.2d 978, 473 N.E.2d 244 (1984); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807 (1978); *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976); *Speck v. Finegold*, 439 A.2d 110 (Pa. 1981); *Phillips v. United States*, 575 F.Supp. 1309, 1315-17 (D.S.C. 1983); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982); *Harbeson v. Parke-Davis, Inc.*, 98 Wash.2d 460, 656 P.2d 483 (1983); *James G. v. Caserta*, 332 S.E.2d 872 (W.Va. 1985); *Dumer v. St. Michael's Hosp.*, 69 Wis.2d 766, 233 N.W.2d 372 (1975). A twenty-second state, Alabama, has reserved ruling, but the Seventh Circuit has opined that Alabama would recognize such a claim. *Compare Boone v. Mullendore*,

pregnancy. All other types of medical malpractice actions against the gynecologist would be available to Mr. and Mrs. Campbell if the elements for such actions were present. Indeed, if the gynecologist negligently performs a sterilization and the woman thereafter gives birth to a healthy child and did not desire an abortion, she can nonetheless sue the doctor in Georgia.[28] This distinction is a negative targeting of the abortion decision and is clearly a thinly disguised State discouragement of the abortion decision. *See Thornburgh v. American College of Obstetricians and Gynecologists.*[29]

In upholding Georgia's law, the concurring opinion in the Eleventh Circuit Court of Appeals applied the Third Circuit's undue burden standard.[30] Even though the Third Circuit's standard was modified by this Court only two weeks (June 29) after the Eleventh Circuit's decision in the instant case and the newly modified standard

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415 So.2d 718, 723 (Ala. 1982) (dictum), *with Robak v. United States*, 658 F.2d 471, 478-79 (7th Cir. 1981).

Five states have either legislatively overruled or acted prior to their appellate courts, by legislatively barring damage claims flowing from the wrongful preclusion of the right to choose abortion, even where the birth of a genetically deficient child causes immensely extraordinary expenses to be borne by the parents. *See* IDAHO CODE § 5-334 (Supp. 1986); MINN. STAT. § 145.424 (1987 Supp.); MO. ANN. STAT. § 188.310 (Vernon Supp. 1987); S.D. CODIFIED LAWS ANN. § 21-55-2 (Supp. 1986); UTAH CODE ANN. § 78-11-24 (1986 Supp.)

[28] *Fulton-DeKalb Hosp. Auth. v. Graves*, 252 Ga. 441, 314 S.E.2d 653 (1984).

[29] 476 U.S. 747, 763 (1986).

[30] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682 (3rd Cir.), *aff'd in part & rev'd in part*, 505 U.S. ___, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

was brought to the Eleventh Circuit's attention, the Court of Appeals thereafter declined to readdress this issue on rehearing. This case now presents this Court with a vehicle for further defining the limits of the undue burden standard, and explicating to the several States why they cannot deny a damages remedy, whether by statute or caselaw, for the wrongful denial of an adult married couple's right to elect a pre-viability abortion.

In *Casey*, the joint plurality opinion: "reject[ed] the trimester framework . . . "[31] and, instead, looked to viability as the more logical dividing line from both a physical and a practical viewpoint.[32] "The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce."[33]

The joint plurality then clarified the standard for determining when a state's action imposes an undue burden on a woman's right to exercise that right.

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus. A statute for this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a

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[31] 505 U.S. ___, 112 S.Ct. 2818, 120 L.Ed.2d 712.

[32] 505 U.S. ___, 112 S.Ct. 2816-17, 120 L.Ed.2d. 710.

[33] 505 U.S. ___, 112 S.Ct. 2820, 120 L.Ed.2d 714-15.

> woman's choice cannot be considered a permissible means of serving its legitimate ends.[34]

Because the restriction imposed by the Georgia law, as enunciated in *Abelson*, does not further the mother's safety or health, nor does it even address any asserted interest in promoting the fetus' life prior to viability, it is inconsistent with the standard set forth in *Casey*.

In the majority opinion below,[35] the Eleventh Circuit noted: " . . . the practical effect of nonrecognition of wrongful birth could very well be that doctors may be less careful in their care for women . . . ." The concurring opinion below: "recognized that one of the functions of tort law is to deter negligent acts, and therefore, . . . agree[d] that the Georgia law has some tendency to encourage carelessness on the part of doctors with respect to advising patients about abortion matters".[36] Notwithstanding either rationale, the Court held that the Georgia law was not a substantial enough burden to be "undue", as it did not eliminate all deterrents to the doctor wrongfully failing to give information necessary to make an informed choice because a disciplinary complaint could be administratively lodged with the state licensing board.[37] However, under *Casey*, the Court of Appeals' focus is misplaced.

The joint plurality in *Casey* emphasized that the constitutionality of a state law must be measured by its

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[34] 505 U.S. ___, 112 S.Ct. 2820, 120 L.Ed.2d 714-15.

[35] Pet.App. 9a-10a.

[36] Pet.App. 16a.

[37] Pet.App. 17a-18a.

impact on the specific group for whom the law is a restriction.[38] The Court, therefore, rejected a focus on the doctor:

> Whatever constitutional status the doctor-patient relationship may have as a general matter, in the present context it is derivative of the woman's position. The doctor-patient relationship does not underlie or override the two more general rights under which the abortion is justified: the right to make family decisions and the right to physical autonomy.[39]

In the context of the Georgia medical malpractice statute, as construed by the Supreme Court of Georgia in *Abelson*, it is clear that the state law impermissibly focuses more on the doctor's position than on the position of the woman and, thus, is inconsistent with *Casey*.

Similarly rejected by the *Casey* joint plurality was the Respondents' attempt there to focus on *all* women who might seek abortions.

> Respondents attempt to avoid the conclusion that § 3209 is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions . . . . Thus, Respondents argue, the effects of § 3209 are felt only by one percent of the women who obtain abortions. Respondents argue that since some of these women will be able to notify their husbands without adverse consequences or will qualify for one of the exceptions, the statute

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[38] 505 U.S. ___, 112 S.Ct. 2829, 120 L.Ed.2d 726.

[39] 505 U.S. ___, 112 S.Ct. 2824, 120 L.Ed.2d 719.

> affects fewer than one percent of women seeking abortions.[40]
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> * * *
>
> The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.[41]

The fact that the Georgia law does not constitute an undue burden on the rights of all women is, therefore, irrelevant.

The Georgia law being challenged here imposes an undue burden on the Constitutional right to a pre-viability abortion only for those women who, like Patricia Campbell, may be wrongfully denied the information necessary to even have reason to consider whether to exercise the right to an abortion. The recent *Webster* and *Rust* abortion cases are, therefore, inapplicable to the issue presented in this Petition. In those cases, this Court was considering limitations on what abortion advice and counselling could be provided by a physician at a publicly funded clinic when a private clinic without public funding was assumed to be open and available across the street.[42] Each of those cases necessarily assumed as fact that the woman had been diagnosed as pregnant and that if she had gone across the street to the non-publicly funded clinic, she could have received full and competent counselling and genetic testing and then made her own

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[40] 505 U.S. ___, 112 S.Ct. 2829, 120 L.Ed.2d 725-26.

[41] 505 U.S. ___, 112 S.Ct. 2829, 120 L.Ed.2d 726.

[42] *See Rust v. Sullivan*, ___ U.S. ___, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

knowing decision. Unlike the women in those cases, Mrs. Campbell was denied the chance to even know she had a decision to make.

The same medical malpractice statute, which as construed by the Georgia Supreme Court, would immunize from liability a physician who wrongfully denies a woman the information necessary to an informed choice, nonetheless allows a suit against the same gynecologist where the woman did not desire an abortion but otherwise had an unplanned pregnancy due to the negligence of that physician.[43] Under the joint plurality opinion's analysis in *Casey*, this disparate treatment of claims encourages physicians opposed to abortion to withhold information and thus amounts to the state's discouragement of abortion, irrespective of whether the abortion is desired before or after viability of the fetus. The denial of any damages remedy to women like Pat Campbell is thus a substantial burden on the pre-viability informed choice, and renders the state law, incorporated into the Federal Tort Claims Act in this case, unconstitutional.[44]

As noted in Justice Stevens' opinion in *Casey*, concurring in part and dissenting in part, this Court has:

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[43] *Fulton-DeKalb Hosp. Auth. v. Graves*, 252 Ga. 441, 314 S.E.2d 653 (1984) [unwanted pregnancy and childbirth after negligently performed sterilization].

[44] The joint plurality opinion in *Casey* also recognized that a husband has a "deep and proper concern and interest in his wife's pregnancy and in the growth and development of the fetus she is carrying." 505 U.S. ___, 112 S.Ct. 2830, 120 L.Ed.2d 726, *quoting Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 69 (1976). Here, the husband is a co-plaintiff with the wife.

> . . . consistently rejected state efforts to prejudice a woman's choice, either by limiting the information available to her, *see Bigelow v. Virginia*, 421 U.S. 809 (1975), or by "requir[ing] the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.' " *Thornburgh*, 476 U.S., at 760; *see also Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 442-449.[45]

The encouragement of the physician's withholding of the information necessary for the woman's choice clearly prejudices the knowledge element of the choice. Because a law immunizing the gynecologist from only this type of tortious conduct has the effect, and thus the design, of influencing "the woman's informed choice between abortion or childbirth", it must fail this test.

State courts have also rejected legal standards similar to Georgia's. The Supreme Court of Ohio stated:

> The choice not to procreate, as part of one's right to privacy, has become (subject to certain limitations) a Constitutional guarantee. [Cit. omitted]. For this Court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations *except* those involving sterilization would constitute an impermissible infringement of a fundamental right.[46]

Similarly, the Idaho Supreme Court quoted the Supreme Court of New Jersey:

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[45] 505 U.S., at ___, 112 S.Ct. 2838, 2841, 120 L.Ed.2d 738, 741.

[46] *Bowman v. Davis*, 48 Ohio St.2d 41, 356 N.E.2d 496 (1976) (emphasis by court).

> A physician whose negligence has deprived a woman of the opportunity to make an informed decision whether her fetus should be aborted should be required to compensate her for the damage he has proximately caused. "Any other ruling would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their Constitutional rights to abort fetuses which, if born, would suffer from genetic defects."[47]

The conclusion of those courts was consistent with this Court's opinion in *Thornburgh v. American College of Obstetricians and Gynecologists*, that poorly disguised elements of a state's discouragement of an adult's abortion decision render such laws unconstitutional.[48]

Moreover, Justice Blackmun's opinion in *Casey*, concurring in part, concurring in the judgment and dissenting in part, would still require strict scrutiny.[49] The Georgia rule adversely impacts the free flow of information necessary for the woman's full and knowing decision, thereby failing the test, as the Georgia rule has nothing to do with protecting life, nothing to do in a previability stage with the mother's liberty interest,[50] but

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[47] *Blake v. Cruz*, 108 Idaho 253, 698 P.2d 315, 318-19 (1984), *quoting Berman v. Allen*, 80 N.J. 421, 404 A.2d 8, 14 (1979).

[48] 476 U.S. 747, 763 (1986).

[49] 505 U.S., at ___, 112 S.Ct. 2843, 2850, 120 L.Ed.2d 744, 752.

[50] The Georgia court's concern with causation in *Abelson* is misplaced because a wrongful birth case is no different than any other failure-to-diagnose malpractice case, e.g., failure to diagnose cancer. The physician who can reasonably bring the condition to the attention of the patient is obligated to do so under the

speculates that this one type of malpractice action might discourage physicians from this practice specialty. 260 Ga. 711, 714 n.5, 398 S.E.2d. 557 n.5. Yet, the proper constitutional focus should be on the woman, not the physician.

The question posed by the instant Petition is what happens when the gynecologist wrongfully informs the female patient that she is not pregnant, thereby completely precluding her opportunity to seek genetic testing or abortion counselling of any kind at any location. Can the State say that she has a right to elect a pre-viability abortion,[51] but if her physician wrongfully precludes her from exercising that right, she is barred from bringing a medical malpractice action against her gynecologist?[52] If

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standard of care. The physician does not cause the initial medical problem, but he/she surely can make it worse by not dealing with it. The standard of care is well-established and requires genetic testing and counselling when the mother is over 35 years old. AMERICAN COLLEGE OF OBSTETRICS & GYNECOLOGY, STANDARDS OF OBSTETRIC & GYNECOLOGIC PRACTICE, 99 (6th ed. 1985); J. WILLSON, E. CARRINGTON & W. LEDGER, OBSTETRICS & GYNECOLOGY, Chapter 2, "Diagnostic Methods of Obstetrics and Gynecology," 33 (7th ed. 1983); J. DEWHURST, INTEGRATED OBSTETRICS & GYNECOLOGY FOR POSTGRADUATES, Chapter 14, "Abortion," 207 (3rd ed. 1981).

[51] *O.C.G.A.* § 16-12-141; Pet.App. 69a.

[52] *Compare Atlanta Obstetrics & Gynecology Group, P.A. v. Abelson*, 260 Ga. 711, 398 S.E.2d 557 (1990), *with* O.C.G.A. § 9-3-70 [defines medical malpractice], Pet.App. 68a-69a, *with* § 31-9-6.1 [amniocentesis informed consent], Pet.App. 70a-71a, *with* § 51-1-27 ["Any injury resulting from the want of such care and skill shall be a tort for which a recovery may be had."], Pet.App. 71a.

allowed to stand, will this not permit a gynecologist opposed to abortions of any type to deprive his patients of the necessary information without civil penalty?[53]

Judicial inquiry has previously focused on the conscientious physician opposed to abortion who may nonetheless find ways ethically to refer his patient to another gynecologist who might give appropriate abortion counselling. However, no Federal court of appeals, until the instant decision by the Eleventh Circuit below, would immunize the physician for wrongfully depriving the patient of the right to exercise this most private of family decisions. *Compare Smith v. Cote*, 128 N.H. 231, 513 A.2d 341, 355-56 (1986) (Souter, J., specially concurring).[54] The State law disallowing a damages claim for the wrongful preclusion of the opportunity to exercise the right to elect pre-viability abortion is an "undue burden" under the joint plurality opinion in *Casey*. It further is a poorly disguised element of a state's discouragement of an adult's abortion decision, contrary to *Thornburgh v. American College of Obstetricians & Gynecologists*,[55] and the other concurring opinions in *Casey*. 112 S.Ct. at 2841 (per Justice Stevens); 112 S.Ct. at 2850 (per Justice Blackmun).

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[53] *But see* O.C.G.A. § 51-1-8 ["The violation of a private duty, accompanied by damage, shall give a right of action."], Pet.App. 71a. *Abelson* has judicially engrafted an exception to this statute in abortion cases.

[54] *See also* 59 U.S.L.W. 3338 (Nov. 6, 1990), discussing questioning on this point at oral argument in *Rust v. Sullivan*, *supra*.

[55] 476 U.S. at 763

The Petition for Writ of Certiorari should be granted, so that this Court may address this question of importance and inform all the States that they may not preclude such damage actions (whether by caselaw, as in Georgia and North Carolina, or by statute as in Utah, Minnesota and elsewhere) and still be consistent with the protected liberty interests of their citizens similarly situated to Patricia and Tom Campbell.

CONCLUSION

The majority opinion of the Eleventh Circuit decision below has unnecessarily caused a split in the Circuits and fails to apply this Court's precedents on whether the Fifth or Fourteenth Amendment governs how to adjudicate due process attacks on state rules of decision incorporated into Federal statutes that set Federal rights and liabilities. Not only is it anomalous to compare judicial relief for the deprivation of the liberty interest involved in electing an abortion to that of approving utility rate increases, the requirement of "state action" is further anomalous when one considers that it is a Federal court adjudicating Federal rights and liabilities under a Federal statute enacted by Congress. The Eleventh Circuit should be overruled and it should be clearly stated that such attacks are measured under the Fifth Amendment Due Process Clause.

The Court should further hold that the concurring opinion of the Eleventh Circuit decision below is erroneous and hold that a State law prohibiting a damages action against a physician who wrongfully precludes a woman and her husband from exercising a pre-viability

abortion decision, where no other type of medical malpractice claim against the same gynecologist is precluded, is an "undue burden" within the meaning of the joint plurality opinion in *Casey*, and further is an express discouragement of the abortion decision by the State within the meaning of *Thornburgh* and the other concurring opinions in *Casey*. This singling out of the liberty interest of adult, married parents who make this decision, should not be treated in such an onerous, disfavored manner, especially when other medical malpractice claims involving issues that do not even trigger Constitutional concerns, are allowed to proceed on to trial.

Questions I and II should be answered in favor of Petitioners and the judgment of the Court of Appeals below should be reversed, with the case remanded for trial.

Respectfully submitted,

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APPENDIX A

Patricia A. CAMPBELL, individually and as mother and natural guardian of Jennifer L. Campbell, a minor; Thomas Campbell, individually and as father and natural guardian of Jennifer L. Campbell, a minor and Jennifer L. Campbell, by her natural guardians and next friends, Patricia A. Campbell and Thomas Campbell, Plaintiffs-Appellants,

v.

UNITED STATES of America, Defendant-Appellee.

No. 91-8744.

United States Court of Appeals, Eleventh Circuit.

June 15, 1992.

Appeal from the United States District Court for the Northern District of Georgia.

Before ANDERSON, Circuit Judge, HILL, Senior Circuit Judge, and YOUNG*, Senior District Judge.

HILL, Senior Circuit Judge:

Thomas and Patricia Campbell appeal from the district court's dismissal of their claim under the Federal Tort Claims Act (FTCA). The Campbells had brought a claim for wrongful birth, alleging that but for the failure

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* Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

of the doctor to diagnose her pregnancy and to administer an amniocentesis exam, the plaintiffs would have terminated the pregnancy, thus averting the birth of a severely mentally retarded and physically impaired child. Since plaintiffs may bring suits against the United States only if the laws of the state in which the injury occurs provides a claim or cause of action for such an incident and since Georgia does not recognize a cause of action for wrongful birth, the district court dismissed the claim. The Campbells argued that this nonrecognition of the wrongful birth cause of action violates their substantive due process and equal protection rights under the Fourteenth Amendment. The district court rejected these constitutional challenges, finding merely that plaintiffs had failed to state a claim under Georgia law. Plaintiffs appeal from this ruling.

Since this appeal is from a dismissal for failure to state a claim, we must accept the plaintiffs' allegations as true. *Miller v. Stanmore,* 636 F.2d 986 (5th Cir.1981). The district court's dismissal of a complaint is subject to *de novo* review. *McDonald v. Hillsborough County School Board,* 821 F.2d 1563, 1564 (11th Cir.1987). As the wife of Thomas Campbell, who was retired from the United States Air Force, Patricia Campbell obtained regular health care from the United States Army Health Clinic at Fort McPherson, Georgia. The clinic employed Dr. Yashasvini Desai in a civil service capacity. From December, 1984, until April, 1985, Mrs. Campbell went to the clinic and complained to Desai of symptoms that would indicate that she might be pregnant. Mrs. Campbell complained of diminished menses, tender breasts, and pain in her lower abdomen. She also indicated to Desai that she was afraid

she might be pregnant. Desai told Mrs. Campbell that she was going through menopause. Plaintiffs allege that Desai deviated from the standard of care by failing to give Mrs. Campbell a conclusive pregnancy test on any of these occasions.

Finally, on April 15, 1985, Mrs. Campbell was given a pregnancy test that turned out positive. The Campbells allege that had the doctor not been negligent and instead had timely diagnosed pregnancy at either the December 1984 (first trimester) or March 1985 (second trimester) visit by Mrs. Campbell to the Fort McPherson Army Health clinic, then under the standard of care applicable to physicians similarly situated, Mrs. Campbell would have been provided genetic counseling and the opportunity for an amniocentesis exam. This exam would have detected the 10Q chromosome deletion that caused the child to be severely impaired. Since Desai had failed to diagnose her pregnancy in a timely manner, he negligently deprived the Campbells of an opportunity for this amniocentesis exam. The plaintiffs allege that if they had learned of the genetic defect before the end of the second trimester, they would have terminated the pregnancy.

The child, Jennifer, will have the maximum mental development of an eight-year old. In addition to her mental impairment, Jennifer requires constant medical care. Mrs. Campbell must feed Jennifer through a syringe and tube inserted in a stoma on her abdomen. At night, Jennifer is fed through a long tube inserted in the stoma. The child has also had corrective surgery for a clubbed foot, crossed eyes, and her esophageal sphincter. The

Campbells seek to recover for the extraordinary expenditures they will need to make during the child's lifetime.[1]

Under the Gonzalez Amendment, 10 U.S.C. § 1089(a), medical malpractice claims are precluded against physicians employed by the Department of Defense. Thus, if the Campbells are to recover at all, they must recover against the United States, as the doctor's employer, under the FTCA. "The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769-70, 85 L.Ed.2d 1058 (1941). The federal government's waiver of sovereign immunity under the FTCA extends only to those torts committed by government employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b), 2674. Thus, "an action under FTCA exists only if the State in which the alleged misconduct

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[1] These mental and physical problems are set out as described in the complaint. They tend to support the plaintiffs' assertion that Patricia Campbell would have chosen abortion had the 10Q deletion been detected. We note, however, that under the appellants' contentions, a cause of action would lie for the birth of even a healthy child; the constitution protects the right of a woman to choose an abortion whether or not the child is defective. *See Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). If the denial of a malpractice cause of action in circumstances such as this violated the constitution, the constitution would be violated whether or not the fetus were defective.

occurred would permit a cause of action for that misconduct to go forward." *Carlson v. green*, 446 U.S. 14, 23, 100 S.Ct. 1468, 1474, 64 L.Ed.2d 15 (1980).

The district court dismissed the plaintiffs' claim under the FTCA because Georgia does not recognize a cause of action for wrongful birth. *Atlanta Obstetrics & Gynecology Group v. Abelson*, 260 Ga. 711, 398 S.E.2d 557 (1990). Since a private person in Georgia would not be liable, then the United States is not liable. *Carlson*, 446 U.S. at 23, 100 S.Ct. at 1474.

The plaintiffs argue that the decision by the Georgia Supreme Court that Georgia law does not provide recovery for wrongful birth violates their Fourteenth Amendment rights to due process and equal protection. The threshold question, then, is how has the doctor violated their rights? The plaintiffs are bringing a tort action for the doctor's failure to provide care to Campbell. The plaintiffs are not bringing a § 1983 claim for deprivation of a constitutional right.

The appellants argue that their tort claim obtains constitutional dimensions, because if they are not permitted to recover, their Fourteenth Amendment rights will be violated. A woman has a protected liberty interest in deciding whether to terminate a pregnancy. *Harris v. McRae*, 448 U.S. 297, 312, 100 S.Ct. 2671, 2685-86, 65 L.Ed.2d 784, *reh'g denied*, 448 U.S. 917, 101 S.Ct. 39, 65 L.Ed.2d 1180 (1980). In making her decision, the woman has the right to be free of affirmative governmental interference. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The appellants contend that the doctor's negligence interfered with Patricia Campbell's right to make a

choice whether to continue her pregnancy. The state of Georgia is involved, the appellants claim, because Georgia's nonrecognition of the cause of action of wrongful birth will encourage doctors to fail to give women all the information they need in exercising their constitutionally protected choice.[2] The question, then, is whether Georgia's nonrecognition of a cause of action is state action that has brought the doctor's conduct within the purview of the Fourteenth Amendment, requiring the doctor's employer to pay money damages for some type of constitutional violation.[3]

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[2] Plaintiffs also claim that Georgia violates their equal protection rights. Georgia recognizes a cause of action for "wrongful pregnancy." This cause of action permits a woman to sue when a doctor negligently fails to sterilize her, resulting in the birth of a child. Plaintiffs argue that Georgia violates equal protection by permitting a cause of action for a negligent act that results in the birth of a child, but refusing to recognize one that results in abortion. Plaintiffs also claim that this discriminates on the basis of gender. Georgia permits recovery for all other types of medical malpractice, except the wrongful birth species on which only women could sue, while men can recover for medical malpractice that injures them. As with their substantive due process claims, these equal protection claims turn on whether there has been state action.

[3] The appellants frame the issue as whether this court should apply an unconstitutional Georgia law. However, there is simply no Georgia law to apply since Georgia does not recognize wrongful birth. Georgia never had a wrongful birth cause of action at common law. After the Georgia legislature enacted *O.C.G.A.* § 51-1-27 which permits medical malpractice actions, the Georgia Supreme Court determined that the legislature did not intend to create wrongful birth actions. *Abelson*, 398 S.E.2d at 560. We construe appellants' argument as asking us to decide that Georgia's nonrecognition of wrongful birth violates the due

The Fourteenth Amendment acts as a shield against only the government. *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948). The constitution does not affect the relations between private parties, "however discriminatory or wrongful." *Id.* However, private conduct may be treated as state action for purposes of the Fourteenth Amendment if the conduct has received the imprimatur of the state. *Blum v. Yaretsky*, 457 U.S. 991, 1003, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982). The United States Supreme Court wrote,

> Our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt of [sic] covert, that the choice must in law be deemed to be that of the state. . . . Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the Fourteenth Amendment.

Blum, 457 U.S. at 1004-1005, 102 S.Ct. at 2786. *See also Carlin Communication, Inc. v. Southern Bell*, 802 F.2d 1352, 1357 (11th Cir.1986). In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), the electric company was required to file a tariff with the Public Utility Commission ("PUC") which would become effective after sixty day unless the PUC rejected it. In its tariff, Edison included a provision which permitted it to terminate a customer's service for nonpayment. 419 U.S. at 354, 95 S.Ct. at 455. The Court held that the PUC's

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process and equal protection rights of the plaintiffs and compels the creation of a wrongful birth cause of action.

approval of the tariff did not transmute the practice into state action. 419 U.S. at 357, 95 S.Ct. at 456-457.

In this circuit, as well, we have held that the mere approval of a utility company's tariff is not sufficient to transform the utility into a public actor. *Carlin,* 802 F.2d at 1357. Southern Bell had made a corporate decision to exclude messages with sexual innuendoes from its Dial-It tariff. The PUC's approval merely indicated that this decision was an appropriate one for a private corporation to make. This acquiescence did not constitute state action in Southern Bell's interference with appellant's First Amendment rights. *Id.*

Even when state laws permit private conduct which allegedly deprives claimants of constitutional rights, these laws do not transform private conduct into state action. While state law does sometimes provide remedies for private wrongs,

> it would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a state, whether decisional or statutory, itself amounted to "state action," even though no process or state officials were ever involved in enforcing that body of law.

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 160 n. 10, 98 S.Ct. 1729, 1735-36, 56 L.Ed.2d 185 (1978). In *Flagg,* the appellant had brought a § 1983 action against a warehouseman, claiming that the proposed sale of the appellant's goods pursuant to a New York statute deprived the appellant of her property without due process of law. The Supreme Court held that a state's merely having laws

regulating the private property rights did not delegate to Flagg Brothers the attributes of a sovereign. *Id.*

In addition, the appellant in *Flagg* argued that the warehouseman's sale should be attributed to New York because New York had authorized and encouraged it by enacting the statute permitting such a sale. 436 U.S. at 164, 98 S.Ct. at 1337. The Supreme Court rejected that argument, noting it had

> never held that a State's mere acquiescence in a private action converts that action into that of the State. . . . It is quite immaterial that the State has embodied its decision not to act in statutory form. If New York had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or to permit the sort of sale threatened here the first time an aggrieved bailor came before them for relief. A judicial decision to deny relief would be no less an "authorization" or "encouragement" of that sale than the legislature's decision embodied in this statute. . . . If the mere denial of judicial belief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denied relief sought by the putative property owner.

Id. at 164-165, 98 S.Ct. at 1337-38.

In the instant case, while Georgia has a statute which permits injured parties to recover for medical malpractice committed by private parties, this statute does not permit recovery for the tort called wrongful birth. While the practical effect of nonrecognition of wrongful birth could

very well be that doctors may be less careful in their care for women, this nonrecognition does not coerce or compel private parties to violate women's rights. If the New York statute that permitted a private party allegedly to violate the constitutional rights of another was not state action, then surely a Georgia statute that does not provide recovery for private conduct is not state action.

Georgia has not commanded doctors to interfere with a woman's constitutional rights. Georgia's reluctance to interject itself into the private relations of its citizens cannot be construed as affirming or encouraging private conduct for purposes of the Fourteenth Amendment. To find state action whenever a state has not acted would broaden state action to encompass practically all private conduct. In effect, plaintiffs' contentions would lead us to a point where all conduct not forbidden by the state could be attributed to the state. Such an interpretation cuts against a basic tenet of our constitutional law: the Fourteenth Amendment regulates the relationship between the state and its citizens, not the private relations between citizens. *Shelley,* 334 U.S. at 13, 68 S.Ct. at 842.

Discerning why a state has not acted can be an impossible task; however, the Georgia Supreme Court has given its reasons for not recognizing the wrongful birth cause of action. *Abelson,* 398 S.E.2d at 561. There is no indication that the Georgia Supreme Court or legislature has disallowed a recovery for wrongful birth because of antipathy to abortion. It is permissible for a court to consider a woman's right to privacy in making decisions about her pregnancy as a public policy favoring the creation of a wrongful birth cause of action. *Blake v. Cruz,*

108 Idaho 253, 257, 698 P.2d 315, 319 (1984). On the other hand, since *Roe v. Wade*, it may be impermissible for a court to consider public policy against abortion when deciding whether to permit the claim. *Id.* at 256, 698 P.2d at 318. Without discussing these policies, the Georgia Supreme Court found that a wrongful birth action was not permitted by *O.C.G.A.* § 51-1-27 because of difficulty in assessing the damages and causation prongs of a traditional tort analysis. *Abelson*, 398 S.E.2d at 561.

Although nineteen other states have apparently had no difficulty in ascertaining the damages and causation caused by a doctor's failure to diagnose,[4] we are not called upon to opine on the Georgia Supreme Court's wisdom. Even if it could somehow be determined that the

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[4] *Turpin v. Sortini*, 31 Cal.3d 220, 182 Cal.Rptr. 337, 643 P.2d 954 (1982); *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988); *Haymon v. Wilkerson*, 535 A.2d 880 (D.C.App.1987); *Fassoulas v. Ramey*, 450 So.2d 822 (Fla.1984); *Blake v. Cruz*, 108 Idaho 253, 698 P.2d 315 (1984); *Siemieniec v. Lutheran General Hosp.*, 134 Ill.App.3d 823, 189 Ill.Dec. 484, 480 N.E.2d 1227 (1985), *aff'd in part and rev'd in part*, 117 Ill.2d 230, 111 Ill.Dec. 302, 512 N.E.2d 691 (1987); *Arche v. United States*, 247 Kan. 276, 798 P.2d 477 (1990); *Profitt v. Bartolo*, 162 Mich.App. 35, 412 N.W.2d 232 (1987); *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (1986); *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981); *Alquijay v. St. Luke's-Roosevelt Hosp. Ctr.*, 63 N.Y.2d 978, 483 N.Y.S.2d 994, 473 N.E.2d 244 (1984); *Becker v. Schwartz*, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978); *Bowman v. Davis*, 48 Ohio St.2d 41, 356 N.E.2d 496 (1976); *Speck v. Finegold*, 497 Pa. 77, 439 A.2d 110 (1981); *Phillips v. United States*, 575 F.Supp. 1309, 1315-17 (D.S.C. 1983); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Naccash v. Burger*, 223 Va. 406, 290 S.E.2d 825 (1982); *Harbeson v. Parke-Davis, Inc.*, 98 Wash.2d 460, 656 P.2d 483 (1983); *James G. v. Caserta*, 175 W.Va. 406, 332 S.E.2d 872 (1985); *Dumer v. St. Michael's Hosp.*, 69 Wis.2d 766, 233 N.W.2d 372 (1975).

Georgia Supreme Court chose to disallow a cause of action for wrongful birth because it would promote abortion, this failure of Georgia to remedy the wrong committed by a private party does not make that party's act an unconstitutional state act.

As the Michigan Court of Appeals noted when confronted with whether Michigan recognizes wrongful birth, "the issue of whether abortion should be allowed and all the related moral, religious, and policy arguments are not before us." *Proffitt v. Bartolo*, 162 Mich.App. 35, 412 N.W.2d 232, 235 (1987). Or, as the Minnesota Supreme Court put it, "The issue is whether the state has a right to decide what action or inaction on the part of one person is actionable by another in the courts of this state." *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 14 (Minn. 1986). The state's decision not to recognize a cause of action for private conduct does not transform that conduct into state action. This is a classic tort action between a private plaintiff and the United States acting as a private employer. Since the plaintiffs have failed to allege a cause of action under Georgia law, the district court's judgment of dismissal is

AFFIRMED.

ANDERSON, Circuit Judge, concurring specially:

I agree with the majority that we should affirm the district court's judgment of dismissal because appellants' negligence claim is not cognizable under Georgia medical malpractice law and, therefore, cannot form the basis for suit under the Federal Tort Claims Act (FTCA). I write separately because I reach this result on the basis of an

analysis which is different from, and inconsistent with, that of the majority.

Respectfully, I submit that the majority misconstrues the issue before us. I agree that, under the facts of this appeal, Dr. Desai is not a state actor. However, the issue we must decide is the substance of the law which is to be applied. Because this is a FTCA case, it is clear that the district court properly looked to Georgia medical malpractice law. But it is also clear that, under the Supremacy Clause, Georgia law applies only to the extent that it is consistent with the United States Constitution. If the Georgia Supreme Court's opinion in *Atlanta Obstetrics & Gynecology v. Abelson*, 260 Ga. 711, 398 S.E.2d 557 (1990), articulated an unconstitutional rule of law, the district court could not properly apply it in construing Georgia's medical malpractice scheme. Therefore, we must consider appellants' constitutional challenge to determine whether the district court correctly implemented Georgia law in dismissing appellants' FTCA claim.[1]

In order to determine whether the Georgia law precluding wrongful birth actions is constitutional, we must first determine the appropriate standard of review. This is not a simple task. In *Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed.2d 147 (1973), the Supreme Court held that abortion was a fundamental right and, therefore, applied strict scrutiny review to Texas' criminal prohibition of abortion. The Court continued to apply strict scrutiny to state laws restricting abortion through

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[1] Appellants' arguments that Georgia's law violates equal protection are without merit and do not require discussion.

the mid-1980's. *See Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759, 106 S.Ct. 2169, 2178, 90 L.Ed.2d 779 (1986); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 427, 103 S.Ct. 2481, 2491, 76 L.Ed.2d 687 (1983). However, in *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), the Court clearly abandoned strict scrutiny analysis in upholding the constitutionality of a Missouri viability testing provision. Chief Justice Rehnquist's opinion, joined by Justices White and Kennedy, upheld the provision under rational basis review. *Id.* at 520, 109 S.Ct. at 3058. Justice Scalia's concurring opinion explicitly called for overruling *Roe* and the constitutional framework it established. *Id.* at 532, 109 S.Ct. at 3064. Finally, Justice O'Connor's concurring opinion upheld the statute because it did not "impose an undue burden on a woman's abortion decision." *Id.* at 530, 109 S.Ct. at 3063. This opinion reflects Justice O'Connor's view that "[i]f the particular regulation does not 'unduly burden' the fundamental right [to choose abortion], then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose," rather than application of strict scrutiny. *Akron*, 462 U.S. at 453, 103 S.Ct. at 2504 (O'Connor, J., dissenting) (citation omitted).

In *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977), the Court provided guidance to lower courts interpreting decisions like *Webster* in which "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices." The Court instructed that "the holding of the Court may be viewed as that position taken by those

Members who concurred in the judgments on the narrowest grounds." *Id.*, 97 S.Ct. at 993 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 2923 n. 15, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)); *see also S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 765 n. 18 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2274, 114 L.Ed.2d 725 and ___ U.S. ___, 111 S.Ct. 2893, 115 L.Ed.2d 1057(1991) (applying *Marks* rule). In a recent opinion, the Third Circuit applied this principle to the Court's abortion jurisprudence and persuasively concluded that Justice O'Connor's opinion in *Webster* provided the narrowest grounds for deciding that case. *Planned Parenthood v. Casey*, 947 F.2d 682, 692-97 (3rd Cir. 1991), *cert. granted*, ___ U.S. ___, 112 S.Ct. 931-32, 117 L.Ed.2d 104 (1992). I agree. In Justice O'Connor's view, a court should apply strict scrutiny review only to regulations on abortion that impose an undue burden and rational basis review to those, as in *Webster*, which do not. *Id.* at 697. Therefore, we should apply strict scrutiny review to Georgia's decision not to recognize a cause of action for wrongful birth if it "significantly burdens a woman's abortion decision," *Planned Parenthood Ass'n v. Miller*, 934 F.2d 1462, 1469 n. 11 (11th Cir. 1991), and rational basis review if the burden on a woman's decision is only minor.

After careful consideration, I conclude that Georgia's refusal to recognize a cause of action for wrongful birth does not place a significant burden on a woman's right to decide whether to terminate a pregnancy. Appellants argue that Georgia's law constitutes a heavy burden on this right because, by immunizing from liability doctors who fail to provide information necessary for making an

abortion decision, the law encourages the negligent withholding of that information. It is well recognized that one of the functions of the tort law is to deter negligent acts, and, therefore, I agree that the Georgia law has some tendency to encourage carelessness on the part of doctors with respect to advising patients about abortion matters. However, because Georgia's nonrecognition of suits for wrongful birth neither actively interferes with a woman's abortion decision nor removes all deterrents to a doctor negligently failing to give information necessary to making an informed choice, I cannot agree with appellants that Georgia's law constitutes an undue burden warranting strict scrutiny.

In reaching this conclusion, I rely on recent Supreme Court cases where the Court has declined to subject to strict scrutiny far greater burdens on a woman's right to choose to terminate her pregnancy. In *Webster,* for example, the Court approved a Missouri law requiring a doctor to conduct certain tests to determine a fetus' viability prior to performing an abortion, except in "situations where it would be careless and imprudent to do so." 109 S.Ct. at 3060 (O'Connor, J., concurring). Under this law, a doctor who fails to perform viability tests has a legal obligation to prove that the tests were imprudent, rather than merely show that the doctor exercised "that degree of care, skill, and proficiency which is commonly exercised by the ordinarily skillful, careful, and prudent physician, engaged in a similar practice under the same or similar conditions." *Yoos v. Jewish Hosp. of St. Louis,* 645 S.W.2d 177, 183 (Mo.App.1982) (quoting *Rauschelbach v. Benincasa,* 372 S.W.2d 120, 124 (Mo. 1963) (standard of care imposed on doctor in medical malpractice case). It

seems clear, then, that, in many cases, Missouri's law would require doctors to perform tests which they would not otherwise perform in the exercise of professional judgment. Nonetheless, as discussed above, five Justices upheld Missouri's law under a rational basis standard. *See also Rust v. Sullivan*, ___ U.S. ___, 111 S.Ct. 1759, 1776-78, 114 L.Ed.2d 233 (1991) (no undue burden on abortion right where federal regulations prohibited projects receiving Title X funds from (1) counseling concerning, (2) referring for, or (3) advocating abortion as a method of family planning).

Georgia's law, on the other hand, does not similarly *require* a doctor to deviate from ordinary practice in advising pregnant women. At most, appellants raise a speculative fear that removing the threat of medical malpractice liability will, in some cases, result in women receiving less information with respect to their abortion decisions. The indirect burden Georgia law places on the abortion right certainly is no greater than the one the Court found merited only rational basis review in *Webster*.

The existence of other deterrents to a doctor negligently failing to give information related to a woman's abortion decision further persuades me that Georgia's law does not unduly burden the abortion right. Even in the absence of the threat of liability for medical malpractice, doctors still have an ethical and professional duty to give full information and advice regarding matters crucial to an informed medical decision. Furthermore, appellants conceded at oral argument that a doctor who negligently failed to provide this information to a pregnant woman still runs the risk of having Georgia's Board

of Medical Examiners determine that the doctor's deficient performance merits suspension or revocation of the doctor's medical license. *See* O.C.G.A. § 43-34-37.

Georgia's law easily satisfies the rational basis standard applicable to minor burdens on the right to choose abortion. In *Abelson*, 398 S.E.2d at 563, the Georgia Supreme Court explained its refusal to recognize a cause of action for wrongful birth absent a clear mandate by the legislature, observing that " 'wrongful birth' does not fit within the parameters of traditional tort law." Appellants have failed to advance any argument why this court should find that the Georgia Supreme Court's decision to leave to the legislature resolution of a difficult policy question is not rational. Therefore, I conclude that Georgia's law passes constitutional muster, and that the district court properly applied *Abelson* to bar appellants' FTCA claim.

APPENDIX B

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8744

PATRICIA A. CAMPBELL, individually and as mother and natural guardian of JENNIFER L. CAMPBELL, a minor; THOMAS CAMPBELL, individually and as father and natural guardian of JENNIFER L. CAMPBELL, a minor and JENNIFER L. CAMPBELL, by her natural guardians and next friends PATRICIA A. CAMPBELL and THOMAS CAMPBELL,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

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(Filed Aug. 20, 1992)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion June 15, 1992, 11th Cir., 19___, ___ F.2d ___).

Before: ANDERSON, Circuit Judge, HILL, Senior Circuit Judge, and YOUNG*, Senior District Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson, III
UNITED STATES CIRCUIT JUDGE

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* Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PATRICIA A. CAMPBELL, et al.,	:	
Plaintiff,	:	
	:	CIVIL
vs.	:	ACTION NO.
UNITED STATES OF AMERICA,	:	1:88-CV-2951-JOF
Defendant.	:	

ORDER

(Filed June 28, 1991)

This matter is before the court on defendant United States of America's motions to extend discovery for sixty days, to stay proceedings, to extend time to file the pretrial order, to dismiss, and to stay proceedings pending a decision on the motion to dismiss. Plaintiffs' motion to file a supplemental brief in response to defendant's motion to dismiss is also before the court.

I. FACTS

When considering a motion to dismiss, the court must accept the material allegations of the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Burch v. Apalachee Community Mental Health Services*, 840 F.2d 797 (11th Cir. 1988). The complaint alleges that plaintiff Patricia Campbell visited the OB-GYN section of Ft. McPherson Army Health Clinic in December of 1984. Plaintiff

was forty years of age at the time and expressed concern that she might be pregnant. The attending physician assured Patricia Campbell that she was not pregnant but failed to conduct a pregnancy test until Campbell had returned to the clinic a third time in April of 1985.

Because of her age, Patricia Campbell was concerned that the fetus might be genetically defective and sought information on amniocentesis and on terminating her pregnancy. After being informed that the government clinic could not perform the amniocentesis procedure or an abortion, plaintiff consulted a private physician. That physician informed her that it was too late safely to perform amniocentesis or an abortion. Plaintiff Jennifer Campbell was born with a chromosomal defect that resulted in numerous physical and mental abnormalities. An amniocentesis procedure would have revealed the presence of this defect. The Campbells state that they would have terminated Patricia Campbell's pregnancy if they had been aware of the defect. Plaintiffs allege that the government doctor's negligence deprived the parents of the information necessary to make a meaningful decision whether or not to continue Patricia Campbell's pregnancy.

Plaintiffs brought this suit under the Federal Torts Claim Act. Plaintiff Patricia Campbell sought damages for mental anguish, pain and suffering, and loss of income. Thomas Campbell and Patricia Campbell jointly seek damages for medical expenses associated with the pregnancy and delivery, and for the special expenses of raising an abnormal child including medical care and special education. Thomas and Patricia Campbell also

presented a claim on behalf of Jennifer Campbell for emotional pain, suffering, anxiety and humiliation.

Defendant filed its first motion to dismiss on grounds that Thomas and Jennifer Campbell had failed to file separate administrative claims as required under the FTCA and that plaintiffs had failed to include a demand for a sum certain. The court rejected these arguments. Defendant also moved for dismissal on grounds that Georgia law does not recognize a cause of action for "wrongful birth" or "wrongful life." Following the Georgia Court of Appeals decision in *Atlanta Obstetrics and Gynecology Group v. Abelson*, 195 Ga.App. 274 (1990), this court dismissed Jennifer Campbell's claims but allowed Thomas and Patricia Campbell to proceed with their claims for wrongful birth. Defendant filed a second motion to dismiss after the Georgia Supreme Court reversed the Court of Appeals in *Abelson v. Atlanta Obstetrics and Gynecology Group*, 260 Ga. 711 (1990).

In *Abelson* the Georgia Supreme Court stated,

> "Wrongful birth" and "wrongful life" actions are both species of malpractice claims wherein relief is sought for allegedly negligent or intentional treatment or advice that has deprived the parents of the opportunity to abort a fetus and thereby avoid the birth of an impaired child. An action for "wrongful life" is brought on behalf of an impaired child and alleges basically that, but for the treatment or advice provided by the defendant to its parents, the child would never have been born. An action for "wrongful birth" is brought by the parents of an impaired child and alleges basically that, but for the treatment

> or advice provided by the defendant, the parents would have aborted the fetus, thereby preventing the birth of the child.

Id., at 713. The court noted that while the majority of courts facing the issue had refused to recognize a cause of action for wrongful life, they had recognized a cause of action for wrongful birth. Nonetheless, the court refused to do so in Georgia, "absent a clear mandate for such recognition by the legislature." *Id.*, at 714.

The court held that a wrongful birth cause of action cannot be maintained under traditional tort law. *Id.*, at 714. The court recognized that a physician has a general duty to impart relevant information to a patient concerning the patient's condition and that wrongful birth actions generally involve allegations of a breach of that duty. The court also recognized a woman's constitutional right to make informed decisions concerning the termination of her pregnancy. However, the court refused to recognize the life of a child as a legal injury. Further, the court held that there was an absence of causation where a child's impairment is unquestionably inherited from its parents and already in existence when the alleged breach of duty by the physician occurs. The court found,

> The only damages which can even be alleged by plaintiffs are those which have arisen from the defendants' alleged failure to take steps which the plaintiffs now say would have led them to abort a fetus, to whose existence and to whose impaired condition the defendants in no way contributed.

Id., at 715-16. Because the elements of causation and legal injury could not be established, the court concluded that

recognition of a cause of action for wrongful birth did not fit within the parameters of traditional tort law. The court declined to fashion a new type of remedy because the difficult issues and policy considerations were not suitable for judicial resolution. *Id.*, at 718-19.

II. PLAINTIFFS' CONSTITUTIONAL CHALLENGE

The Federal Torts Claim Act provides for liability against the United States for,

> personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 USC § 1346. If the government is found liable, it must compensate the injured party "in the same manner and to the same extent as a private individual under like circumstances. . . . " 28 USC § 2674. Recognizing that the Georgia Supreme Court's decision in *Abelson* forecloses all of plaintiffs' claims under Georgia law, plaintiffs now argue that this court should not apply Georgia law because it is constitutionally infirm. In essence, plaintiffs seek to hold the government liable under circumstances where a private person would not be liable to them in accordance with state law.

Plaintiffs argue that Georgia law, as set forth in *Abelson*, deprives women of a remedy for the unconstitutional deprivation of their right to make a free and

informed choice concerning termination of a pregnancy. However, the court knows of no reason why state tort law, especially medical malpractice law, should provide a remedy for deprivation of federal constitutional rights. Clearly, Georgia's medical malpractice laws seek to remedy personal injuries resulting from the failure to exercise the requisite skill or care in treating a patient. *See* O.C.G.A. § 51-1-27. But, there is no evidence that the remedy plaintiffs seek was ever contemplated by the Georgia Legislature. Plaintiffs will not be heard to argue that the Supreme Court's holding in *Abelson* is infirm because it deprives them of a remedy the legislature never intended.

Plaintiffs also allege that *Abelson*'s effect is to deprive women carrying deformed fetuses of their substantive due process right to sue for violations of Georgia's informed consent statute, O.C.G.A. § 31-9-6.1(a), for the reason that the doctor did not cause the deformity. Plaintiffs contend that the doctor never causes the defect or deformity in informed consent cases. However, plaintiffs have no standing to raise this issue because the informed consent statute does not control this action. Prior to the statute's effective date, January 1, 1987, there was no cause of action for informed consent in Georgia. *Reece v. Selmonosky,* 179 Ga.App. 718 (1986).

Further, the statute does not itself provide a cause of action but imposes disclosure requirements upon physicians before performing certain procedures. While breach of the statute's requirements may support a cause of action under the medical malpractice statutes, the statute presupposes that one of the identified procedures was performed. Thus, even if the statute had been effective at

the time Patricia Campbell was treated at the clinic, she still would have no cause of action because none of the named procedures were performed.

Finally, to recover for medical malpractice in Georgia, a plaintiff must show that plaintiff's injury was caused by a lack of skill or care that resulted in additional pain and suffering. *Hawkins v. Greenberg,* 166 Ga.App. 574 (1983); *Parrott v. Chatham County Hospital Authority,* 145 Ga.App. 113 (1978). Plaintiffs do not maintain that their suffering or medical expenses were increased by the doctor's negligence other than asserting that they would not have been incurred at all had plaintiffs been given a meaningful opportunity to terminate the pregnancy. Despite plaintiffs' contention that the crux of their injury was the denial of their right to make an informed choice, the inescapable conclusion is that all of the damages plaintiffs claim flow from the fact that Jennifer Campbell was born rather than not born.

Plaintiffs also challenge *Ableson*'s holding on equal protection grounds, arguing that it applies a facially neutral statute, O.C.G.A. § 51-1-27, so as to discriminate on the basis of gender. Plaintiffs also argue that *Abelson* results in disparate treatment among women. It is true that some plaintiffs will recover under Georgia's medical malpractice law while other plaintiffs who have suffered equal or greater injuries will not recover. Nonetheless, the Georgia Supreme Court's holding in *Abelson* does not turn on questions of gender or other arbitrary classifications. The reason plaintiffs do not have a remedy under Georgia law is that they cannot establish the four elements of a traditional tort cause of action. Thus, plaintiffs are treated no differently than any other plaintiff who

cannot establish the elements of causation or a legally cognizable injury.

The court recognizes that the pain, suffering and expenses resulting from the birth of Jennifer Campbell impose a tragic, severe, and permanent hardship on plaintiffs. Nonetheless, plaintiffs have not shown the court that application of Georgia law, as required by the Federal Torts Claim Act, would be unconstitutional. Consequently, plaintiffs have no cause of action.

III. CONCLUSION

Plaintiffs' motion for leave to file a supplemental brief is **GRANTED**. Defendant's motion to dismiss is **GRANTED**. Defendant's motion to extend discovery, motions to stay proceedings, and motion to extend time to file the pretrial order are moot and are **DENIED**.

SO ORDERED, this 28th day of June, 1991.

/s/ J. Owen Forrester
J. OWEN FORRESTER
UNITED STATES
DISTRICT JUDGE

(Entered on docket July 1, 1991)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

PATRICIA A. CAMPBELL, Individually And As Mother And As Mother And Natural Guardian Of JENNIFER L. CAMPBELL, A Minor, And THOMAS CAMPBELL, Individually And As Father And Natural Guardian Of JENNIFER L. CAMPBELL, A Minor, And JENNIFER CAMPBELL, By Her Natural Guardian And Next Friends, PATRICIA A. CAMPBELL And THOMAS CAMPBELL,	)	CIVIL ACTION FILE NO. 1:88-cv-2951-JOF
Plaintiffs	)	
vs.	)	
UNITED STATES OF AMERICA,	)	
Defendant	)	

AFFIDAVIT OF WILLIAM T. LAYNE, M.D.

STATE OF GEORGIA
COUNTY OF COBB

Before the undersigned officer duly authorized to administer oaths, personally appeared WILLIAM T. LAYNE, M.D., who, after being duly sworn, deposed and stated as follows:

1.

I, William T. Layne, M.D., am a duly licensed Doctor of Medicine, specializing in the practice of obstetrics and gynecology ("OB/GYN") in Cobb County, Georgia. I give this affidavit from personal knowledge and for utilization in the above-styled lawsuit for all purposes.

2.

I have been Board-certified in my specialty since 1970, and I have been in private practice in Cobb County since leaving active duty in the United States Army in 1968, having completed my tour of duty as Chief Obstetrician at the Army Hospital at Ft. McPherson, Georgia.

3.

I have had the occasion to be the treating and attending physician for Patricia A. Campbell, one of the Plaintiffs listed above, during 1968 while I was on active duty in the Army and again since on or about May 6, 1985, and I have also had the opportunity to personally review her Army Health Record. In addition to the medical history that I have obtained from reviewing Patricia Campbell's Army Health Record, I have also had the opportunity to take her personal medical history.

4.

The medical history of Patricia A. Campbell taken from her Army Health Record and from herself both show that she had been treated at the OB/GYN Section, Army Health Clinic, Ft. McPherson, by Dr. Yashasvini

Desai, M.D., for a period of years up through 1984 and 1985. On December 11, 1984, Patricia A. Campbell presented to Dr. Desai with complaints of absence of menses since October 1984, yeast infection, stomach pains, and was known to be age 40. The Army Health Record of Mrs. Campbell, as well as the medical history provided to me by Mrs. Campbell, show that Dr. Desai only performed a pelvic examination on Mrs. Campbell, ordered tests not related to pregnancy, but did not order any tests to confirm or rule out pregnancy. If Mrs. Campbell did express a concern of being pregnant to Dr. Desai at the December 11, 1984, examination, then it is my opinion, to a reasonable medical certainty, that Dr. Desai in that event deviated from the accepted standard of care in the medical community and in the specialty of obstetrics and gynecology by failing to test for and diagnose pregnancy, and, further in such an event, that this constituted negligence on the part of Dr. Desai.

5.

The medical history show by the Army Health Record of Patricia A. Campbell and the medical history provided to me by Mrs. Campbell both show that she again presented to Dr. Desai at the Army Health Clinic at Ft. McPherson, Georgia, in the OB/GYN Section, on March 6, 1985. Mrs. Campbell complained of tenderness in the breasts, pain in the stomach, constant need to urinate with urgency, yeast infection, and the absence of menses since October 1984. Again, Dr. Desai only performed a pelvic examination and did not order any tests relating to, confirming or ruling out pregnancy. There is a handwritten note in the Army Health Record of Mrs.

Campbell next to her March 6, 1985, examination by Dr. Desai making reference to what appears to be a twenty-week baby, which would make a 5.9 to 6 centimeters size mass. Additionally, Dr. Desai prescribed Provera, and there is no medical reason to prescribe this medication other than to convince a patient that she could still have a period. Dr. Desai then told the patient to return "PRN." However, it is the normal and accepted practice, and the standard of care in the medical community, and particularly in the specialty of obstetrics and gynecology, to obtain a negative pregnancy test prior to prescribing Provera as Provera has been connected with certain birth defects, and to explore the nature of the mass which she had detected. It is my opinion, to a reasonable medical certainty, that Dr. Desai deviated from the accepted standard of care in the medical community and particularly the specialty of obstetrics and gynecology in failing to test for and diagnose pregnancy, and that this constituted negligence, irrespective of whether Mrs. Campbell expressed a concern about possibly being pregnant at the March 6, 1985, examination.

6.

The Army Health Record of Mrs. Campbell and the medical history provided to me by Mrs. Campbell both show that she again returned to the Army Health Clinic, OB/GYN Section, Ft. McPherson, Georgia, on April 19, 1985, and that she was finally diagnosed as being pregnant.

7.

It is well known in the medical community, and particularly in the specialty of obstetrics and gynecology, that any woman over age 35 is at risk for genetic defects in any fetus she carries, and that a woman of age 40, such as Mrs. Campbell was during the period from December 1984 through April 1985, is clearly at risk for having a genetically defective fetus. Thus, the standard of care in the medical community and particularly in the specialty of obstetrics and gynecology would require, upon a diagnosis positive for pregnancy, that the patient be given genetic counseling and be given the opportunity to have amniocentesis. The risk of harm to the fetus from amniocentesis is only 1 in 200. The risk of a genetically defective fetus being carried by a 40-year-old woman is 1 in 105. Amniocentesis should be performed between the fourteenth and seventeenth week of pregnancy because it requires three and one-half to four months for sufficient amniotic fluid to develop, and in 1985 it took three and one-half to four weeks to receive back the results of the test. It is a common practice not to perform an abortion beyond the twenty-first or twenty-second week of pregnancy because of the danger to the mother due to the extensive development of the fetus after that time.

7.

I first saw Patricia A. Campbell after she called for an appointment in late April 1985, with an appointment being set for May 6, 1985. At the May 6, 1985, examination in my office, Mrs. Campbell knew she was pregnant because the baby had been kicking. I performed a pelvic

examination, and there was no problem in immediately determining that she was pregnant from this examination, together with her history that her last menstrual period was on or about October 26, 1984. Based on the examination and her history, this meant that she was twenty-seven weeks pregnant at the time of the May 6, 1985, visit to my office. Her weight was also 197 pounds, which was an elevated weight and consistent with that stage of pregnancy in a woman of Mrs. Campbell's build and stature. Had Mrs. Campbell had an amniocentesis at that time, the results would not have been available to me until about the thirty-first week, putting her into the third trimester of pregnancy, which, as stated aforesaid, would have been too late for an abortion due to the danger to her health and physical well-being. Thus, the tubal ligation initially scheduled by the Army for June 7, 1985, was also well past the time to safely perform such a procedure.

8.

Mrs. Campbell subsequently delivered a baby girl, who was born on August 4, 1985, and this child is Jennifer L. Campbell, another of the Plaintiffs listed above. The hospital personnel noted sufficient abnormalities that they had the child examined for genetic deficiencies, which then disclosed that Jennifer Campbell is suffering from a 10Q chromosome deletion. The physical characteristics of Jennifer Campbell include low-set ears, poorly-set eyes, and other physical characteristics assimilated to a chromosome disorder, in addition to which she also suffered from a heart murmur. Subsequent checks of the child revealed an additional physical deformity of a

club foot and disclosed that the child had no sucking capability.

9.

It is my opinions to a reasonable medical certainty, that Dr. Desai deviated from the standard of care in the medical community, and particularly in the specialty of obstetrics and gynecology, when she failed to administer any tests to determine pregnancy at the March 6, 1985, examination, because tests were medically indicated and should have been immediately recognized by any medical doctor regularly practicing in the field of obstetrics and gynecology, irrespective of whether the patient expressed concern about being pregnant. Additionally, if Mrs. Campbell had expressed concern about being pregnant during the December 11, 1984, examination, then it is my opinion, to a reasonable medical certainty, that Dr. Desai deviated from the standard of care in the medical community, and particularly in the specialty of obstetrics and gynecology, when she failed to administer any tests to determine pregnancy at the December 11, 1984, examination because tests in that event would have been medically indicated and should have been recognized by any medical doctor regularly practicing in the field of obstetrics and gynecology. Additionally, it is my opinion to a reasonable medical certainty that the failure to timely and promptly diagnose the pregnancy proximately caused the failure to provide genetic counseling to Mrs. Campbell. Genetic counseling and the opportunity for amniocentesis are clearly called for and are part of the standard of care in the medical community, and particularly in the specialty of obstetrics and gynecology, for pregnant women

who are age 40. The medical reason for such testing is to allow the pregnant mother to know whether she is carrying a genetically defective child, and if she is, it is the mother's choice whether she will continue with the pregnancy or terminate the pregnancy. The aforesaid negligence of Dr. Desai, in my opinion to a reasonable medical certainty, proximately caused Mrs. Campbell not to know that she was carrying a genetically defective child and not be to able to elect to timely terminate the pregnancy, and instead proximately caused Mrs. Campbell to carry the baby to term, delivering a genetically defective child for whom, and for whose expenses, Patricia A. Campbell and Thomas Campbell will be responsible for the rest of their lives, so long as Jennifer L. Campbell lives.

FURTHER, AFFIANT SAITH NOT.

/s/ William T. Layne, M.D.
WILLIAM T. LAYNE, M.D.

(SEAL)

Sworn to and subscribed
before me, this 10th day
of November, 1988.
/s/ Connie B. Betts
Notary Public

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

PATRICIA A. CAMPBELL, Individually And As Mother And As Mother And Natural Guardian Of JENNIFER L. CAMPBELL, A Minor, And THOMAS CAMPBELL, Individually And As Father And Natural Guardian Of JENNIFER L. CAMPBELL, A Minor, And JENNIFER CAMPBELL, By Her Natural Guardian And Next Friends, PATRICIA A. CAMPBELL And THOMAS CAMPBELL,	)	CIVIL ACTION FILE NO. 1:88-cv-2951-JOF
Plaintiffs	)	
vs.	)	
UNITED STATES OF AMERICA,	)	
Defendant	)	

AFFIDAVIT OF HERBERT A. LUBS, M.D.

STATE OF FLORIDA
COUNTY OF DADE

Before the undersigned officer duly authorized to administer oaths, personally appeared HERBERT A. LUBS, M.D., who after being duly sworn, deposed and stated as follows:

1.

I, Herbert A. Lubs, M.D., am licensed to practice medicine in the State of Florida, and I am a Professor in the Department of Pediatrics, and also the Director of Genetics Program, Mailman Center for Child Development, Department of Pediatrics, with both responsibilities being in the University of Miami School of Medicine. I give this affidavit from personal knowledge and for utilization for all purposes in the above-styled lawsuit.

2.

In March 1987, the United States Army requested the Mailman Center for Child Development to perform an independent medical examination on Jennifer Lynn Campbell, one of the Plaintiffs listed above. Jennifer Campbell was brought to Miami by her parents, Thomas Campbell and Particia A. Campbell, the other two Plaintiffs listed above. I had the opportunity to review the medical histories of both Patricia A. Campbell and Jennifer L. Campbell and to examine Jennifer Campbell myself. Likewise, my wife, Marie-Louise Lubs, Ph.D., Associate Professor, Department of Pediatrics, University of Miami School of Medicine, also had the opportunity to review the medical histories of Patricia A. Campbell and Jennifer L. Campbell and to examine Jennifer Campbell. My wife, Dr. Marie-Louise Lubs, is a specialist in genetics, and I am Board-certified in internal medicine, clinical genetics and cytogenetics.

3.

By history, Jennifer Campbell was delivered on August 5, 1985, and suffered a meconium aspiration. By history and by examination, Jennifer Campbell is mentally deficient. Jennifer Campbell also has been diagnosed as having a 10Q chromosome deletion. She has the physical characteristics that are common to other children with this deficiency, although there are not many such other children, and those common characteristics involve the placement of the eyes, the low-set ears, the difficulty with sucking, and mental retardation. In particular, the sucking difficulty also reflects a common experience of such children in breathing, particularly at birth, and this could partially account for the meconium aspiration. With regard to any suggestion that the mental deficit of Jennifer Campbell is due to the meconium aspiration, it is my opinion to a reasonable medical certainty that the primary mental deficit is likely due to the chromosome deficiency. Whether the meconium aspiration was secondary to her impaired function and to what extent the possible meconium aspiration may have added to her impairment are difficult to determine. A mental deficit consistent with that displayed by Jennifer Campbell, however, could be caused by the chromosome deficiency alone.

4.

It is well known and part of the standard of care nationally in the medical community that a 40-year old woman who becomes pregnant is at risk of carrying a genetically defective baby. Thus, the national standard of

care, upon a diagnosis of pregnancy, would include prompt genetic counseling and providing the opportunity for amniocentesis, which test would normally be given during the second trimester of pregnancy. It is my opinion to a reasonable medical certainty that a 10Q chromosome deletion comparable to that present in her cells would be disclosed by amniocentesis, and if Patricia Campbell had been given amniocentesis in a prompt and timely manner during her pregnancy, it is my opinion to a reasonable medical certainty, that the 10Q chromosome deletion would have been disclosed at that time.

5.

More particularly, if pregnancy had been diagnosed at either the December 11, 1984, examination at the Army Health Clinic at Ft. McPherson, Georgia, or the March 6, 1985, examination at the Army Health Clinic, Ft. McPherson, Georgia, sufficient time would have remained to have conducted amniocentesis and to have received the results disclosing the 10Q chromosome deficiency such that Mrs. Campbell could have terminated the pregnancy in a reasonably safe manner during the second trimester of her pregnancy.

6.

Jennifer Campbell was examined in March 1987 at the Mailman Center for Child Development by specialists in the fields of social work, pediatrics, psychology, orthopedics, ophthalmology, physical therapy, nutrition, audiology and genetics. Over the last several years, we have

examined numerous children, prescribing care and treatment for them, and setting up plans for their future care, including many of the practical aspects of that future care. Although I am not an economist, I can state that it is my experience that my patients with genetically defective children have incurred, and face a future in which they will continue to incur, great financial burdens due to the need to care for such children in childhood and adulthood.

7.

With regard to Jennifer Campbell, her intellectual development will be, at best, only half of that of other children her age. It is my opinion to a reasonable medical certainty that her intellectual and mental development will never go beyond that of a child in the range of 5 to 8 years of age. It is my opinion to a reasonable medical certainty that she will continue to need constant care in the home, whether by her mother or custodial help, during her entire childhood and, upon reaching adulthood, she will have to be institutionalized in a long-term care facility. It is my opinion to a reasonable medical certainty that her chromosomal deficit might be passed on to her own children if she ever becomes pregnant. It is further my opinion to a reasonable medical certainty that her mental deficit and physical condition, although impaired, would not inhibit a normal life expectancy for a person with a similar level of retardation because she is not lacking major organs or other essentials for physical existence and her life expectancy will be prolonged to the extent of the good care she receives.

FURTHER, AFFIANT SAITH NOT.

/s/ Herbert A. Lubs, M.D.
HERBERT A. LUBS, M.D.

Sworn to and subscribed
before me, this 20th day
of December, 1988.
/s/ Berniece S. West
Notary Public

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PATRICIA A. CAMPBELL, Individually and as mother and natural guardian of Jennifer L. Campbell, a minor; THOMAS CAMPBELL, Individually and as father and natural guardian of Jennifer L. Campbell, a minor; and JENNIFER L. CAMPBELL, by her natural guardians and next friends Patricia A. Campbell and Thomas Campbell,	)	CIVIL ACTION FILE NO. 1:88-CV-2951-JOF
Plaintiffs,	)	
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS OF FACT AND . . . , PLAINTIFFS' FIRST CONTINUING INTERROGATORIES, . . . PROPOUNDED TO DEFENDANT UNITED STATES OF AMERICA
AND
DEFENDANT'S RESPONSES THERETO

[Extract – Exhibits omitted]

Admission No. 1.

Plaintiff Patricia A. Campbell is a resident of Cobb County, Georgia.

Response: Admitted.

Admission No. 2.

Plaintiff Thomas Campbell is a resident of Cobb County, Georgia.

Response: Admitted.

Admission No. 3.

Plaintiff Jennifer L. Campbell is a resident of Cobb County, Georgia.

Response: Admitted.

Admission No. 4.

Plaintiff Thomas Campbell had retired from active duty in the United States Air Force as an enlisted member prior to November, 1984.

Response: Admitted.

Admission No. 5.

Yashasvini Desai is a medical doctor who was employed by the United States Department of Army, a component of the Department of Defense, in a civil service position at the Army Health Clinic at Fort McPherson, Georgia, during the period of at least December 1, 1984, through April 30, 1985.

Response: Admitted.

Admission No. 6.

A Claim for Damage, Injury or Death (Standard Form 95) was submitted to the Army with the name of each of the three Plaintiffs named above appearing thereon and was dated October 30, 1985.

Response: Admitted.

Admission No. 8.

The aforesaid Standard Form 95 was received by the United States Army on or shortly after October 30, 1985.

Response: Denied. The Ft. McPherson date stamp shows receipt on December 4, 1985, but this date is immaterial to the outcome of this action.

Admission No. 9.

The Post Judge Advocate, Fort McPherson, Georgia, negotiated with the Plaintiffs and their counsel over approximately the next two and one-half years with a view toward adjusting and possibly settling their claim.

Response: Admitted.

Admission No. 10.

The United States Army arranged and paid for an independent medical examination of Plaintiff Jennifer L. Campbell at the Mailman Center for Child Development at the University of Miami School of Medicine during March, 1987.

Response: Admitted.

Admission No. 11.

Plaintiff Jennifer L. Campbell was born on August 5, 1985.

Response: Admitted.

Admission No. 12.

Plaintiff Jennifer L. Campbell has been diagnosed to have a 10-Q chromosome deletion.

Response: Admitted.

Admission No. 13.

During the course of the investigation and review of the aforesaid claim (Exhibit A hereto), Plaintiffs Patricia A. Campbell and Thomas Campbell were interviewed by the Army.

Response: Admitted.

Admission No. 14.

During the investigation and review of the aforesaid claim (Exhibit A hereto), the Army interviewed the private physician, William T. Layne, M.D., who provided prenatal care to Patricia Campbell.

Response: Admitted.

Admission No. 15.

During the Army's adjustment of the aforesaid claim (Exhibit A hereto), the Post Judge Advocate, Fort

McPherson, Georgia, forwarded by letter to Plaintiffs, through their counsel, a Trust Agreement by which Plaintiff Jennifer L. Campbell would have had her medical expenses funded and a Settlement Agreement naming as parties thereto the United States of America and "Thomas Campbell and Patricia A. Campbell, both individually and as parents and natural guardians of Jennifer L. Campbell, a minor."

Response: Admitted.

Admission No. 19.

The Army required that both Plaintiff Patricia A. Campbell and Plaintiff Thomas Campbell sign the aforesaid Settlement Agreement (Exhibit D hereto).

Response: Admitted.

Admission No. 20.

Plaintiff Patricia A. Campbell and Plaintiff Thomas Campbell did sign the aforesaid Settlement Agreement (Exhibit D hereto).

Response: Admitted.

Admission No. 21.

The aforesaid Settlement Agreement signed by Plaintiff Patricia A. Campbell and Plaintiff Thomas Campbell (Exhibit D hereto) had been typed and forwarded by the Army to counsel for Plaintiffs prior to said signatures being affixed.

Response: Admitted.

Admission No. 22.

The aforesaid Settlement Agreement (Exhibit D hereto), identifies Plaintiffs Thomas Campbell, Patricia A. Campbell, and Jennifer L. Campbell as "the Claimants."

Response: Admitted.

Admission No. 23.

The Army further required that Plaintiffs Patricia A. Campbell and Thomas Campbell sign an additional document to be prepared by their own attorney that the aforesaid Settlement Agreement was the entire agreement, which additional document they did so sign on May 4, 1988, and a true copy of said additional document is appended hereto as Exhibit E.

Response: Admitted.

Admission No. 24.

The aforesaid additional document dated May 4, 1988, (Exhibit E hereto) and signed by Plaintiffs Patricia A. Campbell and Thomas Campbell was forwarded to the Army under cover of the letter of their counsel dated May 4, 1988, and a true copy of counsel's said letter is appended hereto as Exhibit F.

Response: Admitted.

Admission No. 27.

Plaintiffs Patricia A. Campbell and Thomas Campbell are the parents of Plaintiff Jennifer L. Campbell.

Response: Admitted.

Admission No. 28.

Plaintiffs Patricia A. Campbell and Thomas Campbell are the natural guardians of Plaintiff Jennifer L. Campbell, who is a minor.

Response: Admitted.

Admission No. 30.

The aforesaid Trust Agreement (Exhibit C hereto) and the aforesaid Settlement Agreement (Exhibit D hereto) were forwarded to the Department of Justice by the Army, recommending approval of the claim.

Response: Admitted.

Admission No. 31.

The aforesaid Trust Agreement (Exhibit C hereto) and the aforesaid Settlement Agreement (Exhibit D hereto) were submitted to the Deputy Attorney General for his approval or disapproval due to the dollar amount involved.

Response: Admitted.

Admission No. 34.

The Justice Department returned the administrative claim to the Department of Army for the latter to issue a formal denial of the claim.

Response: Admitted.

Admission No. 35.

a. The letter of denial of the administrative claim was dated November 3, 1988, recited the aforesaid rejection of the proposed settlement, but did not rely on or cite any non-compliance with administrative claim requirements.

Response: Admitted.

b. By letter dated December 8, 1988, the Department of the Army clarified that the November 3, 1988, denial letter constituted a denial of the claims of Thomas Campbell and Jennifer Campbell, as well as the claim of Patricia Campbell, and that the six-month period for filing continued to run from November 3, 1988.

Response: Admitted.

c. A true and accurate copy of the Army's letter dated November 3, 1988, denying the claim is appended hereto as Exhibit G.

Response: Admitted.

d. * * *

Admission No. 38.

Plaintiff Patricia A. Campbell is the wife of Plaintiff Thomas Campbell.

Response: Admitted.

Admission No. 41.

At all times between December 1, 1984, and through at least April 30, 1985, the aforesaid Dr. Desai was acting in the course and scope of her civil service employment with Defendant when she was with, examined, treated, ordered tests, or prescribed medical care and treatment of and for Plaintiff Patricia A. Campbell.

Response: Admitted.

Admission No. 43.

On December 5, 1984, Plaintiff Patricia A. Campbell (a) visited the Atlanta Care Center in Atlanta, Georgia, but (b) did not take a sample of her first morning void of urine, limiting the effectiveness of the pregnancy test used at Atlanta Care Center, and (c) exhibited tenderness in her breasts.

Response: Admitted.

Admission No. 44.

On December 11, 1984, Plaintiff Patricia A. Campbell visited Dr. Desai at the Fort McPherson Army Health Clinic in the OBGYN Section to have a routine pelvic examination and check-up and to discuss her medical condition with this physician.

Response: Admitted.

Admission No. 45.

(a) At said December 11, 1984, examination, Plaintiff Patricia A. Campbell complained of lower abdominal pains and tender breasts, had a yeast infection, and reported that she had had diminished or non-existent menses since October 26, 1984.

Response: Admitted.

Admission No. 47.

No tests relating to pregnancy were prescribed or performed by Dr. Desai as a result of the December 11, 1984, examination of Plaintiff Patricia A. Campbell.

Response: Admitted.

Admission No. 49.

On March 6, 1985, Plaintiff Patricia A. Campbell was again examined by Dr. Desai at the Army Health Clinic at Fort McPherson, Georgia, in the OBGYN Section.

Response: Admitted.

Admission No. 50.

At the March 6, 1985, examination, Plaintiff Patricia A. Campbell made the following complaints to Dr. Desai:

(a) that Plaintiff Patricia A. Campbell was experiencing the need to urinate frequently and with some urgency;

(b) that Plaintiff Patricia A. Campbell had pain in her lower abdomen;

(c) * * *

(d) * * *

Response: Denied, except for (a) and (b).

Admission No. 52.

At the March 6, 1985, examination of Plaintiff Patricia A. Campbell, Dr. Desai counselled Plaintiff Patricia A. Campbell that she was experiencing the "change of life" and that the abdominal symptoms were the result of a descending uterus, and Dr. Desai further told Plaintiff Patricia A. Campbell not to drink so many diet Cokes.

Response: Admitted.

Admission No. 54.

Dr. Desai did not diagnose pregnancy in Plaintiff Patricia A. Campbell during or as a result of the March 6, 1985, examination of said Plaintiff.

Response: Admitted.

Admission No. 56.

On April 19, 1985, Plaintiff Patricia A. Campbell was given a pregnancy test for the first time at the Army Health Clinic at Fort McPherson, Georgia.

Response: Admitted.

Admission No. 58.

Only when the April 19, 1985, pregnancy test results came back positive for pregnancy did Dr. Desai state that Plaintiff Patricia A. Campbell was pregnant.

Response: Denied. [*But See* Answer to First Interrogatory No. 11 *infra*.]

Admission No. 59.

Dr. Desai, after finally determining that Plaintiff Patricia A. Campbell was pregnant, did not provide any genetic counselling to Plaintiff Patricia A. Campbell and did not discuss the possibility of amniocentesis with Plaintiff Patricia A. Campbell.

Response: Admitted.

Admission No. 60.

During each of the three aforesaid examinations of Plaintiff Patricia A. Campbell, Dr. Desai was aware that Plaintiff Patricia A. Campbell was forty (40) years of age.

Response: Admitted.

Admission No. 61.

The standard of care in the medical community and particularly in the specialty of obstetrics and gynecology calls for genetic counselling and discussing amniocentesis with a patient when the patient is a forty (40) year old pregnant female.

Response: Denied. [*But See* Answer to First Interrogatory No. 11 *infra.*]

Admission No. 62.

It is well known and widely accepted in the medical community and particularly in the specialty of obstetrics and gynecology that a forty (40) year old woman who becomes pregnant is at risk for bearing a genetically defective fetus.

Response: Admitted.

Admission No. 64.

The delay in diagnosing the pregnancy of Plaintiff Patricia A. Campbell in 1985 proximately caused her inability to have an amniocentesis, to obtain the results thereof, and to have an abortion performed all prior to the third trimester of her pregnancy.

Response: Denied. [*But see* Answer to First Interrogatory No. 11 *infra.*]

Admission No. 65.

Plaintiff Patricia A. Campbell carried her child to term and gave birth to Plaintiff Jennifer L. Campbell on August 5, 1985.

Response: Admitted.

Admission No. 66.

Plaintiff Jennifer L. Campbell has been diagnosed by Dr. Herbert A. Lubs, M.D., pursuant to an independent medical examination arranged by Defendant, as having the potential of only a maximum intellectual and mental development of an eight year old girl during her life time.

Response: Admitted.

Admission No. 67.

Plaintiff Jennifer L. Campbell has the same statistical life expectancy in duration of years as any other mentally retarded girl born in 1985 in the United States of America.

Response: Admitted.

Admission No. 68.

Plaintiff Jennifer L. Campbell requires constant care and attention by an adult and will so require such care and attention for the rest of her life.

Response: Admitted.

Admission No. 69.

It is reasonably foreseeable that Plaintiff Jennifer L. Campbell will have to be institutionalized when she approaches or reaches adulthood.

Response: Admitted.

Admission No. 70.

A 10-Q chromosome deletion is readily detected by means of amniocentesis.

Response: Admitted.

INTERROGATORIES

Plaintiff's First Interrogatory No. 11.

Please state each and every fact upon which you base your denial of any of the foregoing Request for Admissions of Fact and Authenticity of Documents, and correspond such facts with the numbered Request that you denied.

Defendant's Answer:

* * *

Admission No. 58: This would be admitted except that it follows No. 57 and thus gives a misleading impression.

Admission No. 61: When Mrs. Campbell's pregnancy was diagnosed, it was too late for amniocentesis, if termination of pregnancy was the objective.

Admission No. 64: It is disputed that an abortion could not have been performed at the time of diagnosis. It would, admittedly, have been difficult to obtain an abortion but there were practitioners performing abortions at this late date. It is admitted that the absence of a diagnosis before April, 1985, made it impossible to have amniocentesis and to get the results back in time to abort a defective child.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PATRICIA A. CAMPBELL, individually and as mother and natural guardian of JENNIFER L. CAMPBELL, a minor; THOMAS CAMPBELL, individually and as father and natural guardian of JENNIFER L. CAMPBELL, a minor; and JENNIFER L. CAMPBELL, by her natural guardians and next friends PATRICIA A. CAMPBELL, and THOMAS CAMPBELL,	)	CIVIL ACTION FILE 1:88-CV-2951-JOF
Plaintiffs,	)	
vs.	)	
UNITED STATES OF AMERICA,	)	
Defendant,	)	

Deposition of YASHASVINI H. DESAI, M.D., taken on behalf of the Defendant, pursuant to the stipulations agreed to herein, before Anne S. Higgins, Certified Court Reporter and Notary Public, at Judge Advocate General's Office, Fort McPherson, Georgia, on the 16th day of October, 1990, commencing at the hour of 10:20 a.m.

* * *

[p. 92] BY MR. EASTWOOD:

Q Thank you. In Exhibit 24-E, you make a statement "A third trimester abortion is available in hospitals in cases of serious congenital anomalies demonstrated by chromosomal studies." What hospitals are you familiar with here in Georgia that offer a third trimester abortion?

A I do not know.

Q Do you know what the requirements in Georgia are [p. 93] with regard to hospitals performing abortions in the third trimester?

A No.

Q Here you say "I presumed that Mrs. Campbell was going ahead with an abortion by Dr. Tiller or someone else."

A Correct.

Q I thought you just testified that she told you emphatically that she couldn't go to Dr. Tiller because that would let her husband know she was pregnant?

A Right, she definitely did not want to go through with this pregnancy so, therefore, I presumed that if not Dr. Tiller, at least somebody here in Atlanta.

Q Now, your phone calls around to Midtown and other places that we have got on Exhibits 4 and 5 indicate that at 6.2 centimeters biparietal diameter, Midtown Hospital wouldn't do an abortion?

A Correct.

Q And based on your calls, it was your understanding that there were no others in Atlanta that would do

one, and that is why you referred her to possibly Dr. Tiller in Kansas?

A I provided her the information.

Q And that's why, because you couldn't find anyone in Atlanta who would do one at 6.2 centimeters; is that correct?

[p. 94] A I believe Midtown was the only place that I know of, but Mrs. Campbell had looked into many other places as far as I recall. Which places, I am not sure.

Q The reason that she had you call out to Eisenhower Medical Center to get this measurement from the sonogram was?

A Because the Midtown wanted the ultrasound. They would have the facility but she would have to pay for the ultrasound, and that is why we made her an appointment to go to Eisenhower to have the ultrasound.

Q They wanted to know the biparietal diameter to determine under their own guidelines whether they would perform one?

A Right.

Q When you talked to Midtown, you were advised that at 6.2, they stopped?

A They would not do one at 6.2. At this case, the fetus was at 6.2 centimeters.

* * *

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-8744

PATRICIA A. CAMPBELL, individually and as mother and natural guardian of JENNIFER L. CAMPBELL, a minor; THOMAS CAMPBELL, individually and as a father and natural guardian of JENNIFER L. CAMPBELL, a minor; and JENNIFER L. CAMPBELL, by her natural guardians and next friends PATRICIA A. CAMPBELL and THOMAS CAMPBELL,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA

Defendant-Appellee

On Appeal From the United States District Court
for the Northern District of Georgia

REPLY BRIEF

JONES, BROWN, BRENNAN & EASTWOOD
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Reid G. Kennedy
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ATTORNEYS FOR APPELLANTS

* * *

B. State Action?

The Government's approach to this case is unfortunately too simplistic. As will be addressed hereafter, although there are headnotes in some of the cases supporting the arguments made by the Government, many of them are inapposite to the facts or the legal issues in this case. The first of these is the defense of "state action."

This is a case under the Federal Tort Claims Act (FTCA) for the negligent infliction of damages upon Mr. and Mrs. Campbell due to medical malpractice. Of necessity, the case requires a federal court to issue a judicial decision as to whether or not the Campbells are entitled to recover. Thus, the decision by the District Court is plainly "federal" action in adjudicating the case. Moreover, the Constitutional rights argued in this case involve substantive due process and equal protection, both of which are protected under the Fifth Amendment as well as under the Fourteenth Amendment of the Federal Constitution. *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). The "state action" argument is misplaced.

Moreover the Government incorrectly contends that the governmental action complained of, whether state action or federal action, is not present because this is

merely the private act of Dr. Desai in malpracticing on Mrs. Campbell, which this does not trigger any constitutional protections. Although the Government correctly cites Headnote 3 in *Shelley v. Kraemer*, 334 U.S.1, 13-14, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948), the Court there said more:

> That the action of state courts and of judicial officers in their official capacities is to be regarded as an action of the State within the Fourteenth Amendment, is a proposition which has been long established by decisions of this Court.

334 U.S. 13-14, 68 S.Ct. 842.

The constitutional attack which the Campbells make herein is that the Georgia Supreme Court has refused to apply a facially neutral tort statute equally to similarly situated litigants and instead has construed its plain words ("any injury") in a new rule of law that sets up a woman's right of choice as the *only* area of medical malpractice without a remedy, thereby plainly discriminating on the basis of abortion. Thus, the judicial non-recognition of this cause of action is indeed governmental action, *see Shelley v. Kraemer, supra*, and the Government's reliance on *Carlin Communication, Inc. v. Southern Bell*, 802 F.2d 1352, 1357 (11th Cir. 1986), is inapposite to the issue at bar.

In fact, the Supreme Court in a case cited by the Government, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 164, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978), expressly distinguished its holding therein from cases involving selective enforcement of laws on the basis of race. 436 U.S. at 158-63, 98 S.Ct. at 1734-37. The case at bar involves the selective

enforcement of facially neutral tort statutes among pregnant female plaintiffs where abortion is the key distinguishing factor.

Accordingly, the arguments by the Government regarding "state action" are misplaced and have no bearing on the resolution of this case.

* * *

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Statutes:

Gonzalez Amendment, 10 U.S.C. § 1089(a) (1988):

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician . . . of the armed forces, the National Guard while engaged in training or duty . . . , the Department of Defense, . . . while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician . . . (or the estate of such person) whose act or omission gave rise to such action or proceeding.

Assimilative Crimes Act:

18 U.S.C. § 13 (1988). *Laws of states adopted for areas within federal jurisdiction.*

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Federal Tort Claims Act:

28 U.S.C. § 2672 (1988). *Administrative adjustment of claims.*

> The head of each Federal agency . . . may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss . . . caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred . . .

28 U.S.C. § 2674 (1988). *Liability of United States.*

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Social Security Act

Federal Old-Age, Survivors, and Disability Insurance Benefits:

42 U.S.C. § 416 (1988). *Additional Definitions.*

> (h) Determination of family status
>
> (1)(A) An applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this subchapter if the courts of the State in which such insured individual is domiciled at the time such applicant files an application, or, if such insured individual is dead, the courts of the State in

which he was domiciled at the time of death, or, if such insured individual is or was not so domiciled in any State, the courts of the District of Columbia, would find that such applicant and such insured individual were validly married at the time such applicant files such application or, if such insured individual is dead, at the time he died. . . .

* * *

(2)(A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

Georgia statutes:

O.C.G.A. § 9-3-70. *"Action for medical malpractice" defined.*

As used in this article, the term "action for medical malpractice" means any claim for damages resulting from the death of or injury to any person arising out of:

(1) Health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care rendered by a person authorized by law to perform such service or by any person acting under the supervision and control of the lawfully authorized person; or

(2) Care or service rendered by any public or private hospital, nursing home, clinic, hospital authority, facility, or institution, or by any officer, agent, or employee thereof acting within the scope of his employment

§ 16-12-141. *When Abortion is Legal: Filing a certificate of abortion by performing physician.*

(a) Nothing in this article shall be construed to prohibit abortion performed by a physician duly licensed to practice medicine in surgery pursuant to Chapter 34 of Title 43, based upon his best clinical judgment that an abortion is necessary.

(b) No abortion is authorized or shall be performed after the first trimester unless the abortion is performed in a licensed hospital or in a health facility licensed as an abortion facility by the Department of Human Resources.

(c) No abortion is authorized or shall be performed after the second trimester unless the physician and two consulting physicians certify that the abortion is necessary in their best clinical judgment to preserve the life or health of the woman. If the product of the abortion is capable of meaningful or sustained life, medical aid then available must be rendered.

* * *

O.C.G.A. § 31-9-6.1. *Disclosure of certain information of persons undergoing certain surgical or diagnostic procedures; failure to comply; exception; regulations establishing standards from limitation.*

(a) Except as otherwise provided in this Code Section, . . . any person who undergoes an amniocentesis diagnostic procedure . . . must consent to such procedure and shall be informed in general terms of the following:

(1) A diagnosis of the patient's condition requiring such proposed surgical or diagnostic procedure;

(2) The nature and purpose of such proposed surgical or diagnostic procedure;

(3) The material risks generally recognized and accepted by reasonably prudent physicians [listing risks] . . . which, if disclosed to a reasonable prudent person in the patient's position, could reasonably be expected to cause such prudent person to decline such proposed surgical or diagnostic procedure on the basis of the material risk of injury that could result from such proposed surgical or diagnostic procedure;

(4) The likelihood of success of such proposed surgical or diagnostic procedure;

(5) The practical alternatives to such proposed surgical or diagnostic procedure which are generally recognized and accepted by reasonably prudent physicians; and

(6) The prognosis of the patient's condition as such proposed surgical or diagnostic procedure is rejected.

* * *

(d) A failure to comply with the requirements of this Code Section shall not constitute a separate cause of action but may give rise to an action for medical malpractice as defined in Code Section 9-3-70 and as governed by other provisions of this Code relating to such actions; and any such action shall be brought against the responsible physician or any hospital, ambulatory surgical treatment center, professional corporation, or partnership of which the responsible physician is an employee or partner and which is responsible for such physician's acts, or both, ...

* * *

O.C.G.A. § 51-1-8. *Right of action arising from breach of private duty.*

Private duties may arise from statute or from relations created by contract, express or implied. The violation of a private duty, accompanied by damage, shall give a right of action.

O.C.G.A. § 51-1-27. *Recovery for medical malpractice authorized.*

A person professing to practice surgery or the administering of medicine for compensation must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from the want of such care and skill shall be a tort for which a recovery may be had.

FILED
JAN 1 0 1993

No. 92-758

In the Supreme Court of the United States

OCTOBER TERM, 1992

PATRICIA A. CAMPBELL AND
THOMAS CAMPBELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the failure to recognize a cause of action in tort for wrongful birth violates a woman's right to elect an abortion under the Due Process Clause of the Fifth or Fourteenth Amendment to the Constitution.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-18a, is reported at 962 F.2d 1579. The opinion of the district court, Pet. App. 21a-28a, is reported at 795 F. Supp. 1127.

JURISDICTION

The judgment of the court of appeals was entered June 15, 1992. A petition for rehearing was denied August 20, 1992. The petition for a writ of certiorari was filed on October 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, Patricia and Thomas Campbell, are the parents of Jennifer Campbell, a mentally retarded and physically impaired child. Jennifer's impairment is allegedly due to a chromosomal defect. Petitioners allege that a doctor employed by the United States Army Health Clinic at Fort McPherson, Georgia, failed to diagnose Patricia Campbell's pregnancy. Petitioners allege further that, had they timely learned of the pregnancy, they would have obtained an amniocentesis examination; would have learned of the chromosomal deficiency that caused Jennifer's impairment; and would have obtained an abortion that would have prevented Jennifer's birth. Pet. App. 2a-3a, 21a-22a.

2. Petitioners brought this action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* Petitioners invoked two related tort theories. One theory was a "wrongful birth" theory, under which petitioners sought damages "for medical expenses associated with the pregnancy and delivery, and for the special expenses of raising an abnormal child, including medical care and special education." Pet. App. 22a. The other was a "wrongful life" theory, under which they sought damages "on behalf of Jennifer Campbell for emotional pain, suffering, anxiety and humiliation." *Id.* at 23a.[1]

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[1] The Georgia Supreme Court distinguishes between "wrongful birth" and "wrongful life" actions as follows:

> "Wrongful birth" and "wrongful life" actions are both species of malpractice claims wherein relief is sought for allegedly negligent or intentional treatment or advice that has deprived the parents of the opportunity to abort a fetus and thereby avoid the birth of an impaired child. An action for "wrongful life" is brought on behalf of an impaired child and alleges basically that, but for the treatment or advice provided by the defendant to its parents, the child would never have

The United States has waived sovereign immunity under the FTCA only to the extent to which "a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b); see also 28 U.S.C. 2674. The Georgia Supreme Court has held that, under Georgia law, there is no cause of action for "wrongful birth." *Atlanta Obstetrics & Gynecology Group* v. *Abelson*, 398 S.E.2d 557, 563 (Ga. 1990).[2] Accordingly, the district court granted the government's motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief could be granted. Pet. App. 28a.

3. Petitioners appealed only from that portion of the judgment denying their claim for "wrongful birth," arguing that "what the Georgia Supreme Court has done is unconstitutionally alter its tort remedies so as to deprive female citizens of the United States residing in Georgia of any remedy for the deprivation of their right of free choice regarding whether to abort a defective fetus or to carry it to term." Appellant's C.A. Br. 39. Petitioners concluded that "the federal courts should not, in

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> been born. An action for "wrongful birth" is brought by the parents of an impaired child and alleges basically that, but for the treatment or advice provided by the defendant, the parents would have aborted the fetus, thereby preventing the birth of the child.

Atlanta Obstetrics & Gynecology Group v. *Abelson*, 398 S.E.2d 557, 559 (Ga. 1990), *quoted at* Pet. App. 23a-24a.

[2] Georgia is one of seven states that currently do not recognize damage claims for wrongful birth, either by statute or case law. See *Azzolino* v. *Dingfelder*, 337 S.E.2d 528 (N.C.), cert. denied, 479 U.S. 835 (1986); *Wilson* v. *Kuenzi*, 751 F.2d 741 (Mo.), cert. denied, 488 U.S. 893 (1986); Idaho Code § 5-334 (Supp. 1986); Minn. Stat. § 145.424 (1987 Supp.); Mo. Ann. Stat. § 188.310 (Vernon Supp. 1987); S.D. Codified Laws Ann. § 21-55-2 (Supp. 1986); Utah Code Ann. § 78-11-24 (1986 Supp.).

the face of an obvious deprivation of constitutionally guaranteed liberties, recognize state tort law as binding upon the outcome, when to do so would perpetuate the denial of those constitutional rights by the federal court itself." *Ibid.* The panel ruled that petitioners' constitutional challenge lacked merit.

a. A majority of the court concluded that petitioners were arguing that "Georgia's nonrecognition of wrongful birth violates the due process and equal protection rights of the plaintiffs and compels the creation of a wrongful birth cause of action," Pet. App. 6a n.3, and concluded that Georgia's failure to recognize a cause of action against a private party for wrongful birth did not violate the Fourteenth Amendment. Relying on *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 160 n.10 (1978), the majority held that the Fourteenth Amendment is limited to state action, and applies to the actions of private parties only if they act with state encouragement or coercion. Reasoning that the mere absence of laws regulating private conduct "does not coerce or compel private parties to violate women's rights," Pet. App. 10a, the majority concluded that "a Georgia statute that does not provide recovery for private conduct is not state action" and therefore does not violate the Fourteenth Amendment, *ibid.*; *id.* at 10a-12a.

b. Judge Anderson concurred. He believed that Georgia's decision not to recognize a wrongful birth cause of action did involve state action. Pet. App. 13a. Nonetheless, he rejected petitioners' constitutional claims on their merits. He concluded that Georgia law, considered as a whole, does not impose an undue burden on a woman's right to choose an abortion and therefore does not violate the Due Process Clause. *Id.* at 13a-18a.

ARGUMENT

Petitioners challenge the lower courts' rulings that they cannot recover under Georgia law for their claim of wrongful birth. There is no conflict among the circuits on the question presented by this case. To our knowledge, neither this Court nor any other court of appeals has considered whether the failure to recognize a cause of action in tort for wrongful birth violates a woman's right to elect an abortion under the Fifth or Fourteenth Amendment to the Constitution. In addition, petitioners' claims lack merit. Thus, there is no reason for review by this Court.

1. a. "[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948). As the majority noted, "private conduct may be treated as state action for purposes of the Fourteenth Amendment if the conduct has received the imprimatur of the state." Pet. App. 7a. This Court has held that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement * * * that the choice must in law be deemed to be that of the State." *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). While state law does sometimes provide remedies for private wrongs, the Court has explained that:

> It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no process or state

officials were ever involved in enforcing that body of law.

Flagg Bros., Inc. v. *Brooks*, 436 U.S. at 160 n.10. Those decisions support the judgment below. The cause of petitioners' injury is the failure of a physician correctly to diagnose Mrs. Campbell's pregnancy. Georgia's case law, which does not recognize a remedy under tort law for wrongful birth, neither encourages, authorizes, nor coerces such behavior. Thus, there is no state action at issue here for purposes of the Fourteenth Amendment.

b. Relying on cases as *Mathews* v. *Lucas*, 427 U.S. 495 (1976), and *Thomas* v. *Sullivan*, 922 F.2d 132 (2d Cir. 1990), petitioners argue that a court should "adjudicate[] [constitutional] attacks on the underlying state law * * * under the Fifth, *not* the Fourteenth, Amendment." Pet. 7-8. They contend that the choice between the Fifth or Fourteenth Amendment is significant since, in their view, the Fifth Amendment contains no parallel to "the 'state action' requirement under the Fourteenth Amendment." Pet. 10.

Although petitioners assume that the Fifth Amendment controls their claims, the lower courts understood that petitioners argued that the Georgia tort law violated the Constitution and that the FTCA should incorporate Georgia law only insofar as it is constitutional.[3]

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[3] In this Court, petitioners characterize their case differently than they did in the lower courts, now contending that the case was brought as an "attack * * * on a Federal provision setting rights and liabilities." Pet. 8. By contrast, in the lower courts, petitioners characterized their attack as one challenging "the Georgia Supreme Court [because it] unconstitutionally alter[ed] its tort remedies so as to deprive female citizens [of their constitutional rights] regarding whether to abort a defective fetus or to carry it to term." Appellants' C.A. Br. 39. That characterization provides a more than rational basis for the lower courts to have concluded that petitioners' claims concern primarily the constitutionality of

The Fourteenth Amendment, not the Fifth Amendment, restrains the States, so it is natural that the courts below evaluated petitioners' claims under the Fourteenth Amendment.[4]

c. Relying on *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), petitioners claim that "[i]f judicial intrusion into religious issues is state action sufficient for the *Presbyterian* case, then judicial hostility to abortion rights in tort cases should also be sufficient state action." Pet. 9. But that case did not discuss the issue of state action. *Presbyterian Church* involved First Amendment restraints on an award by a state civil court of "church property on the basis of the interpretation and significance the civil court assigns to

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the state-law rule of decision. In any event, whether the courts below correctly understood the focus of petitioners' claim is not an issue worthy of review on certiorari.

[4] *Mathews* v. *Lucas*, 427 U.S. 495 (1976), on which petitioners rely, is not to the contrary. That case involved a constitutional challenge to a section of the Social Security Act providing for the distribution of survivor's benefits to children only if, under state laws "applied in determining the devolution of intestate personal property," the children were classified as legitimate or illegitimate. 427 U.S. at 498 n.1 (citation omitted). *Lucas* did not involve a constitutional challenge to state laws creating such classifications. Thus, because the target of the challenge was federal law, it was necessary and appropriate to evaluate the challenge under the Fifth Amendment. In any event, characterizing the claim as resting on the Fifth rather than the Fourteenth Amendment would not change the nature of the issue. Cf. *Martinez* v. *California*, 444 U.S. 277, 281 (1980) (state law immunizing from tort liability public employees who make parole-release determinations "cannot be characterized as state action depriving a person of life"). Indeed, the state action requirement of the Fourteenth Amendment would be virtually meaningless if all private persons in the United States were bound to comply with the parallel obligations imposed by the Fifth Amendment on the federal government.

aspects of church doctrine." 393 U.S. at 441. There, unlike here, Georgia courts resolved a dispute about property, according to state law, between private parties. That type of state action is absent here.[5]

2. a. In any event, petitioners' due process claim lacks merit. In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 112 S. Ct. 2791 (1992), a plurality of this Court concluded that the constitutional right to an abortion is in some respects fundamental, and in some respects not. The plurality said that strict scrutiny review applies only to state regulation of abortion whose "purpose or effect [is to place] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 112 S. Ct. at 2820. State regulation that does not place an "undue burden" on a woman's choice is valid if it is rationally related to a legitimate state interest.

Georgia's failure to recognize a cause of action in tort for wrongful birth satisfies this standard. As the concurrence noted, "Georgia's refusal to recognize a cause of action for wrongful birth does not place a significant burden on a woman's right to decide whether to terminate a pregnancy." Pet. App. 15a. This is because Georgia's law does not "actively interfere[] with a woman's abortion decision." *Id.* at 16a. The mere failure to recognize a cause of action in tort "does not * * * *require* a doctor to deviate from ordinary practice in advising

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[5] There also is no foundation for petitioners' claim that the Georgia Supreme Court declined to recognize a wrongful birth cause of action because of that court's hostility toward abortion. The Georgia Supreme Court explained that the question whether to create such a tort was better suited to legislative than judicial resolution because "the legislature offers a forum wherein all of the issues, policy considerations and long range consequences involved in recognition of the novel concept of a 'wrongful birth' cause of action can be thoroughly and openly debated and ultimately decided." *Abelson*, 398 S.E.2d at 563.

pregnant women," *id.* at 17a; rather, Georgia's law merely does not provide one form of deterrent—potential tort liability—that it is possible for a State to impose. Physicians are still restrained by their "ethical and professional duty to give full information and advice regarding matters crucial to an informed medical decision," *ibid.*, and if physicians improperly withhold such information, they run "the risk of having Georgia's Board of Medical Examiners determine that the doctor's deficient performance merits suspension or revocation of the doctor's medical license," *id.* at 17a-18a. A physician also cannot escape suspension or revocation of his license through the use of insurance. Accordingly, the concurrence correctly concluded that petitioners have "[a]t most * * * raise[d] a speculative fear that removing the threat of medical malpractice liability will, in some cases, result in women receiving less information with respect to their abortion decisions." *Id.* at 17a. Bare speculation cannot establish the existence of an undue burden. Cf. *Casey*, 112 S. Ct. at 2832-2833 (plurality opinion).

b. Petitioners maintain that it is "irrelevant" that Georgia law does not constitute an undue burden on the rights of all women. Pet. 16. They contend that there is an undue burden every time any woman is "wrongfully denied the information necessary to even have reason to consider whether to exercise the right to an abortion." *Ibid.* That analysis is mistaken. Petitioners must show not just that a physician's negligence has burdened their ability to choose to terminate a pregnancy; they must demonstrate that the failure of the government to provide them with a tort law cause of action encouraged physicians' negligent behavior, which in turn burdened their ability to choose to terminate a pregnancy. They have not done so.

Because Georgia's failure to recognize a cause of action for wrongful birth imposes no undue burden, it need only be rationally connected to legitimate state purposes to be upheld. Georgia law satisfies that standard. The Georgia Supreme Court explained that a wrongful birth was not easily classified as a normal tort as to causation and the calculation of damages. The court also pointed out that jurisdictions that have recognized a wrongful birth tort have not been able or willing to adopt the traditional damages rule that tortfeasors are responsible for the foreseeable consequences of their negligent acts. *Abelson*, 398 S.E.2d at 561. For example, some courts have allowed parents to recover only extraordinary expenses of child rearing, not the ordinary child-rearing expenses. *Id.* at 561-562. Finally, recognizing a wrongful birth tort would require a court to resolve various other difficult policy questions, such as whether parents can recover damages for expenses that occur after a child reaches the age of majority; whether damages for pain and suffering are available; whether damages should be offset by the benefits accruing to the parents from the fact that they have a child; and whether (and, if so, to what extent) a child's equitable claim on the damages award given to its parents must be recognized in the crafting of the damage award. The Georgia Supreme Court observed that there is nothing resembling a consensus in the jurisdictions recognizing the cause of action, because the cause of action does not fall within, and is hence not cabined by, traditional elements of tort liability. *Id.* at 563.[6] Under these circumstances, it was

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[6] See also Note, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 Val. U.L. Rev. 127, 170 (1978) ("It is naive to suggest that * * * a [wrongful birth] situation falls neatly into conventional tort principles, producing neatly calculable damages.").

reasonable for that court to decline to create a novel cause of action and, instead, to leave to the legislature the resolution of a difficult policy question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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PATRICIA A. CAMPBELL and THOMAS CAMPBELL,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a substantive due process attack on a state rule of decision that is incorporated into a Federal statute, such as the Federal Tort Claims Act, and then used by a Federal court to determine Federal rights and liabilities under that statute, is adjudicated under the Fifth Amendment, or is adjudicated under the Fourteenth Amendment which additionally requires "state action"?

2. Whether a law, refusing to allow a damages claim for the wrongful preclusion of Petitioners' right to elect a pre-viability abortion of a genetically deficient fetus, constitutes an undue burden on the parents' liberty interest in this most personal of family decisions?

(The United States Court of Appeals for the Eleventh Circuit, in its majority opinion, answered Question One by utilizing the Fourteenth Amendment and affirmed a judgment for Defendant on a "state action" basis, while the concurring opinion below reached the merits of the Constitutional question in Question Two but found no "undue burden".)

REPLY TO BRIEF IN OPPOSITION

Pursuant to SUP. CT. R. 13.5, Petitioners hereby respond to matters asserted for first time in the *Brief in Opposition*.

Respondent argues on pages 6-7 in its *Brief in Opposition*, at footnote 3, that "the lower courts" viewed Petitioners' claims as arising under the Fourteenth Amendment. A review of the district court decision, Pet. App. 21a-28a, 795 F.Supp. 1127 (N.D.Ga. 1991), discloses no discussion of state action or the Fourteenth Amendment. Thus, only the two-judge majority of the Eleventh Circuit panel focused on the Fourteenth Amendment.

Additionally, Respondent in the *Brief in Opposition*, at 4, states that: "Judge Anderson concurred. He believed that Georgia's decision not to recognize a wrongful birth cause of action did involve State action. Pet App. 13a." However, a review of the concurring opinion at Pet. App. 13a shows that it does not focus on state action but instead looked at the substantive due process claim at issue. The concurring opinion below actually stated at Pet. App. 13a:

> Because this is a FTCA case, it is clear that the district court properly looked to Georgia medical malpractice law, but it is also clear that, under the Supremacy Clause, Georgia law applies only to the extent that it is consistent with the United States Constitution. If the Georgia Supreme Court's opinion in *Atlanta Obstetrics & Gynecology v. Abelson*, 260 Ga. 711, 398 S.E.2d 557 (1990), articulated an unconstitutional rule of law, the district court could not

properly apply it in construing Georgia's medical malpractice scheme.

The first time the Fourteenth Amendment and/or state action were mentioned by the Government in the *Brief of Appellee*, at 9-11, in the Eleventh Circuit, the Government conceded that Petitioners: " . . . do not specifically cite the Fourteenth Amendment in their Brief. . . . " *Brief of Appellee*, at 9 n.4. Having successfully directed the Court of Appeals' attention to the "state action" issue, the Respondent does *not* directly argue in this Court that the majority opinion below is correct. *See Brief in Opposition*, 6-7. The Government only notes that: " . . . it is natural that the courts [*sic*] below evaluated petitioners' claims under the Fourteenth Amendment." *Brief in Opposition*, 7. However, it is telling that the rephrasing of the Issue in this case by Respondent focuses on the Due Process Clause and not whether the Eleventh Circuit properly resolved the case on a "state action" basis.

CONCLUSION

The Court should view the *Brief in Opposition*, on the "state action" issue for what it is, i.e., a tacit admission that majority opinion below incorrectly resolved the matter.

This case is worthy of the grant of certiorari because, as a result of the Respondent's misdirected advocacy below, there is now a published decision that under one statutory scheme enacted by Congress (the Federal Tort Claims Act) the rule of decision incorporated into federal

law by Congress is to be measured under the Fourteenth Amendment, while in other statutory schemes enacted by Congress (such as the Social Security Act and the Federal Assimilative Crimes Act) the rule of decision incorporated into federal law by Congress is to be governed under the Fifth Amendment. This anomaly will only continue to produce bad law and is patent error.

If for no other reason, the opinion of the Eleventh Circuit should be vacated and the case remanded for reconsideration under this Court's decision, not that of the Third Circuit, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. ___, 112, S.Ct. 2791, 120 L.Ed.2d 674 (1992).[1]

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[1] On remand, the Eleventh Circuit can certify the damages issue to the Georgia Supreme Court if it concludes that the state rule of decision is unconstitutional. Such certification on the damages issue does not involve the issue presented in this case and would allay the concerns argued by Respondent in the *Brief in Opposition*, at 10.

Alternatively, the writ should be granted and this Court should reach the merits of the substantive due process issue.

Respectfully submitted,

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